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The use of mediation to resolve environmental disputes in South Africa and Switzerland

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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The use of mediation to resolve environmental disputes in South Africa and Switzerland

A *Introduction*

Mediation as one form of Alternative Dispute Resolutions (ADR) is nowadays recommended as an alternative to adversarial approaches, especially to expensive and time-consuming litigation, which until recently has been viewed as the only form of dispute resolution when legal procedures fail to settle a case or the parties involved fail to solve the problem on their own. Mediation procedures can be used prior to, in parallel with, or subsequent to conventional procedures and other instruments or can be linked to them. Mediation is not intended to replace the legal system. Mediation recognises that other values are also useful and postulates that society will benefit from the availability of less adversarial and more co-operative procedures.

Until recently mediation has been used almost only in the field of labour law but new experiences with mediation in other fields of law, for example divorce law, has shown that mediation procedures have the ability to resolve disputes in almost every field of law. Since more than 3 decades mediation is now also used, at least in some countries, to resolve environmental disputes. Nevertheless, a broader (world-wide) discussion and application of mediation in environmental disputes began only in the late 1980s and it still leads - except in the USA and Canada - only a shadowy existence in many countries. However, in many countries there has been a slow but ongoing introduction of these procedures since the start of the 1990s, and there are clear indications that this will continue to be the case. With help of this minor dissertation I want to examine how environmental mediation as a procedure to resolve environmental disputes is implemented in South Africa and Switzerland.

The minor dissertation is structured as follows: After a short overview about mediation as one mechanism to resolve environmental disputes and the advantages respectively disadvantages of this kind of alternative dispute resolution, the focus shifts in paragraph C to the use of mediation to resolve environmental disputes in Switzerland. On the basis

of several cases in which mediation or mediation-type activities were used to resolve the environmental conflict I want to show why, in the end, environmental mediation probably will never be so widespread in Switzerland as it is in other countries. The paragraph ends with a case study about mediation experiences in Switzerland over nuclear waste disposal. Nevertheless, this aforementioned case study shows that the Swiss decision-making system offers a good basis for mediation procedures in areas of politics where there is yet little participation as long as certain preconditions for a successful procedure are fulfilled. In paragraph D I deal with the use of mediation in South Africa to resolve environmental disputes. The focus shifts in a first step on the National Environmental Management Act (NEMA), especially Chapter 4 NEMA which deals with Alternative Dispute Resolution and, in particular, with environmental mediation. In a next step I examine if this Chapter has been already implemented or if there is still a big gap between theory and practice. Finally, paragraph D ends with two South African cases in which mediation was involved to resolve the dispute and a comparison of the two procedures.

B Mediation as a process to resolve (environmental) disputes

B.1 The beginning of mediation as a mechanism for environmental dispute resolution

The use of mediation as an alternative instrument for settling environmental conflicts began in the United States of America in the early 1970s although it had already been used in the 1960s to settle community and labour-management disputes. The initiative in the environmental sector was taken by Gerald W. Cormick and Jane E. McCarthy¹ who successfully carried out a mediation project concerned with settling disputes over the planned construction of dams on the Snoqualmie River in Washington State. The first explicit effort to mediate an environmental dispute began in 1973, when Cormick and McCarthy initiated discussion with several parties to a flood-control and land-use planning conflict on

¹ Birkhoff & Lowry *Whose Reality Counts* 27, in: O'Leary & Bingham *The Promise and Performance of Environmental Conflict Resolution* (2003) RFF Press (USA).

the river. By the end of 1974 a written agreement was concluded between about a dozen parties involved in the conflict.²

A broader (world-wide) discussion and application of mediation in environmental disputes began only in the late 1980s and, except in the USA and Canada,³ it is barely used. Nevertheless, in several countries there has been a slow but ongoing introduction of these procedures since the start of the 1990s, and there are clear indications that this will continue.

B.2 Definition of environmental mediation

Mediation is not easy to define; it does not provide a single analytical model which can be neatly described and distinguished from other decision-making processes.⁴ Gerald W. Cormick⁵, who pioneered the use of the mediation process in environment conflicts, defines mediation as:

"A voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution."

Another definition of mediation⁶ which includes definitions by other authors, states that:

"Mediation introduces an outside neutral into the settlement process to act as a facilitator. Stullberg has provided the following explanation of mediation: The mediation process can be characterised as follows: It is (1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to these issues (6) which are acceptable to the parties. As with negotiation the only rules or

² Cormick & Patton *Environmental Mediation: Defining the Process Through Experience* 76 et sqq. in: Lake (editor) *Environmental Mediation: The Search for Consensus* (1980) Westview Press (USA).

³ Therefore most of the literature used in this paragraph refers to the mediation of environmental disputes in North America.

⁴ Boule & Rycroft *Mediation: Principle, Process and Practice* (1997) Butterworths (South Africa) Chapter 1, 3.

⁵ Weidner *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) sigma (Germany) at 16.

⁶ Weidner, op cit note 5, at 16.

structures that apply are those imposed by the parties themselves. No objectively definitive norms or principles are assumed to control the outcome. As Fuller suggests, it is the settlement itself that creates the norm. And, like negotiation, the settlement requires the mutual agreement of the parties.”

Seen in terms of negotiating, a central device in political theory and even more so in policy analysis, mediation can be defined as negotiation with the assistance of a trusted, independent and impartial third party whereas negotiation is defined as:⁷

“A bargaining relationship between parties who have a perceived or actual conflict or interest. The participants voluntarily join in a temporary relationship designed to educate each other about their needs and interests, to exchange specific resources or to resolve one or more intangible issues such as the form the relationship will take in the future or the procedure by which problems are to be solved. Negotiation is a more intentional and structured dispute resolution process than informal discussion and problem-solving.”

But mediation not only includes a third party as guardian of the procedure it also has to fulfil some basic prerequisites. These include the following minimum conditions:⁸

- a. “There must be recognition by all parties of the necessity of other parties participating in the process as coequals; that means some level of partnership between the parties has to be achieved.*
- b. Each of the parties involved must have sufficient power of influence to sanction other parties’ abilities to take unilateral action.*
- c. Participants should be able to commit themselves and their constituencies to implementing agreements reached in the negotiation process.*
- d. Participants must have some sense of urgency with respect to settling the dispute.”*

⁷ Weidner, op cit note 5, at 17.

⁸ Ibid.

It is one of the central responsibilities of the mediator to ensure that these basic conditions are fulfilled both before and during the procedure. That is why the success of an (environmental) mediation depends to a great part on the skills of the mediator. An experienced and well trained mediator is thus an important precondition for a successful mediation.

B.3 Skills of an environmental mediator

It is becoming clear that the environmental mediator needs special qualities and skills in order to be able to fulfil the role assigned to him or her in the mediation procedure. Although the ideal person will seldom be found, practice has nevertheless shown that there are sufficient people with a natural leaning to the job who at least adequately fulfil the requirements.⁹ But even the best mediator cannot ensure that the parties will reach a satisfactory resolution in every case; after all, success or failure is the ultimate responsibility of the disputants. A good mediator can contribute significantly to the chances for success, while a bad mediator can actually impede progress and cost the parties additional time and money.¹⁰

The following criteria are usually given as the important characteristics of a mediator: neutrality/impartiality¹¹ in relation to the issue of the conflict and the participating actors, independence of any interest groups relevant to the conflict (including those not taking part in the procedure) and communicative competence. They should be financially independent, so that they can objectively to judge their own suitability for particular cases. Mediators must be willing to turn down work and carefully assess each potential case prior to committing themselves to take over the task or to a particular design.¹² In trying to select a good mediator, focus on impartiality/neutrality, process knowledge, confidentiality, substantive knowledge and experience, seems to me important.

- Neutrality/Impartiality

Neutrality refers to mediators' prior knowledge about or interest in the outcome of disputes, and impartiality to the way in which they

⁹ Ibid., at 18.

¹⁰ Yarn *Alternative Dispute Resolution: Practice and Procedure in Georgia* Chapter 6, at paragraph 6-15

¹¹ See for the difference between neutrality and impartiality Boule & Rycroft, op cit note 4, at 208-210.

¹² Weidner, op cit note 5, at 19.

conduct the process and treat the parties. In these senses, neutrality is not an indispensable feature of mediation, whereas impartiality is.¹³ I therefore focus on the term of impartiality. Impartiality can be described as freedom from bias or favoritism and a lack of any interest in the outcome of the dispute.¹⁴ Granted that a mediator has no power to bind the parties or impose a decision, to that extent bias is not a considerable problem. A disputant can always walk out or ask the mediator to withdraw if he feels the mediator's bias is harming the negotiations. But even the perception of bias can be harmful to the negotiations, so it is important to select a mediator whose impartiality is not questioned by either party.¹⁵

- Confidentiality

The duty to maintain confidentiality remains one of the most important ethical requirements of mediators.¹⁶ A mediator must maintain the reasonable expectations of confidentiality depending on the circumstances of the mediation and any agreements they make. The mediator shall not disclose any matter that a party expects to be confidential unless all parties give permission or unless required by law or other public policy.¹⁷

- Process knowledge and experience

Another important consideration is the mediator's training and experience in the mediation process. Mediating may be an art, and some people may have an aptitude, but there is some essential craft that can and should be learned. Of course, actual mediation experience can make a big difference. Unfortunately, the relative newness of the process has produced very few experienced mediators.¹⁸ For some disputes, it may be helpful to have a

¹³ Boulle & Rycroft, op cit note 4, at 208.

¹⁴ Yarn, op cit note 10, at 6-15.

¹⁵ Ibid.

¹⁶ Boulle & Rycroft, op cit note 4, at 210.

¹⁷ See Standards of conduct for mediators, in: Mediation: Sarah Christie Conciliation Module – Outline short loan reading list (Handout 10) 12 August 2004.

¹⁸ Yarn, op cit note 10, at 6-15.

mediator with expertise in the subject matter in dispute.¹⁹ Substantive expertise can be particularly helpful in a specialised area such as the environment. It is therefore advantageous to concentrate on finding a mediator with process knowledge, training, and experience over substantive knowledge. If a mediator with mediation expertise and subject matter expertise can not be found, I agree that the most critical mediation skills relate to the process, not the substance:

*"If you must choose, choose mediation expertise over subject matter expertise. An experienced mediator can be relied upon to assimilate rapidly the key technical and legal issues in even the most complex lawsuits."*²⁰

- Further requirements

Further requirements on the mediator vary with the kind of case; gender, age, race and cultural background.²¹ Thus, for example, it can be an advantage to have knowledge of political and administrative procedures or a high social reputation, authority or a persuasive nature. The appointment of a mediator with a high social reputation can be very helpful in certain disputes. For example, the appointment of former South African President, Nelson Rolihlahla Mandela, has given the Burundian Peace Process a major and much needed new lease on life.²² The world-wide high social reputation of Nelson Mandela was enough to bring the parties back together on the round table.

Finally it is important that beside these general skills an environmental mediator at least has a basic understanding of environmental and environmental policy problems.²³

¹⁹ Riskin & Westbrook *Dispute Resolution and Lawyers* (1998) West Group (USA) at 183.

²⁰ Weidner, op cit note 5, at 19.

²¹ Yarn, op cit note 10, at 6-15.

²² Burundi Report February 2000, www.ccrweb.ccr.uct.ac.za/archive/burundi_reports/burrep-feb2000.html (accessed on 30 July 2005).

²³ Weidner, op cit note 5, at 18.

B.4 Advantages and Disadvantages of mediation to resolve environmental disputes

At first glance it is difficult to see why anyone would criticise the environmental dispute resolution approach. Why would anyone be against such desirable things as co-operation, communication and win-win solutions? Nevertheless, there are critics of this process. I discuss the advantages and the disadvantages of environmental dispute resolution in the following paragraphs.

B.4.1 Advantages

The increase in the use of mediation to resolve environmental disputes since the early 1970s may be attributed to a number of factors:

First, the increase in the USA may be attributed to public dissatisfaction with the ability of the federal judicial system to handle environmental disputes. It has been argued that the failure of the judicial system to resolve environmental disputes in a timely fashion hurts all parties involved.²⁴ With the increasing number of cases, delays are inevitable. In environmental cases delay can be costly. Delays may also be harmful to environmental interest groups, if they are not established, well-funded entities.²⁵ Thus the argument is made that mediation is superior to litigation because it is much faster and, consequently, the problems caused by delay can be avoided. The parties do not have to wait months (or years) for a trial date; they can meet with the mediator almost immediately. Cases that have been in litigation for a long time are often resolved relatively quickly once the parties turn to mediation. For example the dispute over the Snoqualmie River Dam²⁶ had been in the court system for seventeen years before being resolved through eight months of mediation.²⁷

Second, consensual approaches to resolving environmental conflict are often superior to litigation because of the lower process costs of mediation compared to litigation. Exact figures are difficult to estimate, but one author conservatively estimated that, complex mediation cases

²⁴ Williams 'Consensual approaches to resolving public policy disputes' *Journal Dispute Resolution* (2000) at 144.

²⁵ Kubasek & Silverman 'Environmental Mediation' 26 *American Business Law Journal* (1988) at 540.

²⁶ See on the whole case Lake, op cit note 2, at 85 et sqq.

²⁷ Kubasek & Silverman, op cit note 25, at 540.

could run into thousands of dollars, but complex lawsuits could cost millions.²⁸

Third the litigation process itself may be inappropriate for handling environmental disputes. The courts are primarily designed to resolve disputes between two parties; environmental disputes often affect more than two parties and are retrospective in their focus. Having a greater number of parties at the mediation table is also seen as being desirable because it maximises benefits and minimises costs. Each party is seeking a solution that gives the greatest gains to its interests at the least cost.²⁹ Presumably each party will also attempt to achieve these gains at the lowest cost to others as well, because if the costs to others are too high they will not voluntarily pay these costs, and mediation requires a voluntary agreement. Thus, the process will focus on maximising total benefits for all and minimising collective costs.³⁰ As long as many tribunals do not have a own department with specialists which deal with environmental disputes litigation may be, with regard to costs and time, inappropriate for environmental disputes.

Fourth, many commentators contend that consensual processes are preferable to litigation when resolving environmental disputes because the use of an adversarial process of litigation is often counterproductive. An adversarial process, which usually fosters hostility between the disputants, is troublesome in environmental disputes because, after the litigation ends, the parties are required to coexist peacefully.³¹ Mediation, on the other hand, can often serve an educational function. It educates the parties as to the other disputants' positions, thereby improving the relationship between the parties and perhaps reducing the likelihood or magnitude of future disputes. It also increases the potential to develop compromise solutions acceptable to all participants.³² Conflicts are bound to occur in the future and the negative feelings engendered by the litigation process will make it more difficult for the parties to resolve future disputes.³³

²⁸ Ibid., at 541.

²⁹ Ibid., at 543.

³⁰ Ibid.

³¹ Williams, op cit note 24, at 145.

³² Kubasek & Silverman, op cit note 25, at 545.

³³ Ibid., at 546.

Another particular advantage of mediation is that, unlike conventional instruments, which often produce win/lose solutions, it can produce solutions in which everybody wins (win-win solutions).³⁴ The efforts of the mediator are directed toward a compromise that will satisfy some of the desires of each of the parties.³⁵ Both parties tend to feel that they received something. Thus, they are more likely to perceive the outcome as fair, abide by the agreement and mediate future misunderstandings.³⁶ Because the agreement was voluntary, and they helped formulate it, they feel more committed to making it work and because the parties feel that they may have gained something from the agreement, they are more likely to abide by it in order to preserve their gains.³⁷ Contrary to mediation, a lawsuit requires a winner and a loser. The emphasis focuses on winning and because of the often public nature of the controversy, the parties may be less willing to compromise, even if a compromise might resolve the case.³⁸ Furthermore, parties may have confidential information that they would be reluctant to reveal to an adversary. They might be more willing to share the material in confidence with the mediator, with this disclosure facilitating a settlement.³⁹

B.4.2 Disadvantages

Critics of mediate environmental disputes point out a number of weaknesses. The fundamental criticisms can be summarised as follows:

First, many environmental statutes expressly require elaborate procedural safeguards because speedy and final resolution of environmental problems may not always be in society's best interest.⁴⁰ At times disputes involve such highly charged issues and potentially devastating effects to health and the environment that there is no room for compromise.⁴¹ For example the establishment of a disposal site involves such potentially effects. Thus, in both countries, South Africa and

³⁴ Susskind & Cruikshank 'Breaking the Impasse: Consensual Approaches to Resolving Public Disputes' (1987) Basic Books (USA) at 11; Fisher/Ury/Patton 'Getting to Yes: Negotiating Agreement Without Giving In' (1991) Random House (USA).

³⁵ Kubasek & Silverman, op cit note 25, at 546.

³⁶ Williams, op cit note 24, at 145.

³⁷ Kubasek & Silverman, op cit note 25, at 546.

³⁸ Ibid., at 550.

³⁹ Phillips & Piazza 'The Role of Mediation in Public Interest Disputes' *Hastings Law Journal* (1983) at 1234.

⁴⁰ Schoenbrod 'Limits and Dangers of Environmental Mediation' 58 *N.Y.U.L. Rev.* (1983) at 1453.

⁴¹ Tompkins 'Mediation, the Mediator, and the Environment' 11 *Nat. Resources & Environment* (1996) at 68.

Switzerland, the establishment of any disposal site is prohibited by law⁴² and only allowed under certain conditions and by permission of the government.

Second, some cases may be just too important to mediate. In such cases only through a lawsuit a legal precedent can be established or an interpretation of a statute can be obtained.⁴³

A third problem which may arise in mediating environmental disputes is that there is a greater potential for no uniform outcomes among similar proposals⁴⁴ which can lead to the destabilisation of the legal certainty in the country. When cases are litigated, judges rely on precedent and attempt to apply the law uniformly to similarly situated parties. The outcome of each mediation is a creative and often novel resolution and parties are not bound by precedent. Arguably, this potential for widely disparate outcomes is or could become unfair.⁴⁵ This disparity of outcomes may in turn lead to an erosion of regulatory rules. Parties who do not like certain regulations may try to achieve a mediated settlement whereby they avoid the direct application of the rule.

A fourth potential problem with mediating environmental disputes is the possibility that not all interested parties are prepared to become involved in the resolution process. Thus, a significant problem is the lack of joinder mechanism available in litigation. The voluntary nature of mediation means that it is only binding on the participants and therefore lacks a regulatory dimension. For a successful and recognised mediation process it is therefore necessary to identify and involve all affected and interested parties. Otherwise there is always the risk that parties who are not participants in the mediation process will file suit. This inability of the mediator to force parties to the mediation table may have several adverse consequences. First, when the parties who have the authority to implement an agreement are present at the mediation table, the chances of reaching a successful agreement are significantly increased. Thus, if those with the authority to make settlements cannot be forced to the bargaining table respectively are not perceived as the legitimate

⁴² Section 20 (1) of the Environment Conservation Act, 1989 and section 9 (1) Umweltschutzgesetz.

⁴³ Schoenbrod, op cit note 40, at 1468.

⁴⁴ Kubasek & Silverman, op cit note 25, at 548.

⁴⁵ Ibid.

spokesperson for the opposing view, the chances of success declines.⁴⁶ The refusal of the United States and Israel, for example, to recognise the PLO as the legitimate bargaining agent for Palestinians and the corresponding refusal of the PLO to recognise Israel stood for years in the way of peace talks in the Middle East.⁴⁷

A fifth problem with mediating environmental disputes arises when an issue of great significance needs resolution. Settlement reached through mediation does not establish judicial precedent. In addition, a consensual settlement is not subject to judicial review.⁴⁸ Furthermore, troubling issues of confidentiality may arise when environmental issues affecting the public interest are resolved behind closed doors.⁴⁹

A final concern with mediating environmental disputes involves a potential imbalance of power. If not each of the parties involved in the mediation process have sufficient power of influence to sanction others abilities to take unilateral action, litigation may protect the interests of the parties in a better way.⁵⁰

C *The Use of mediation to resolve environmental disputes in Switzerland*

C.1 *Mediation in Switzerland*

The Swiss political culture stresses consent. It follows that negotiated solutions and consensus-building mechanisms are widespread. The State, which is relatively weak at its centre, because of extensive decentralisation, the cantonal system and a large degree of direct democracy in form of referendum politics, is obliged to adopt an inclusive strategy vis-à-vis its opponents.⁵¹ Therefore, the central government needs to develop strategies for involving opponents at a local and

⁴⁶ *Ibid.*, at 550.

⁴⁷ Moore, *The mediation Process Practical Strategies for resolving conflicts* (2003) Jossey-Bass (USA) 189.

⁴⁸ Schoenbrod, op cit note 40, at 1457.

⁴⁹ Tompkins, op cit note 41, at 68; confidentiality is one of the hallmarks of mediation, but this aspect of mediation that makes it an attractive alternative to costly litigation may clash with the idea of public participation found in most environmental statutes and regulations.

⁵⁰ *Ibid.*

⁵¹ Waelti, *Swiss Mediation Experiences over nuclear Waste Disposal*, in: Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) sigma (Germany) 281.

cantonal level from the very outset. Decisions are normally re-negotiated and modified at a federal, cantonal and local level in order to adapt them to special local policy needs.⁵²

Knoepfel⁵³ describes the following five types of conflict resolution mechanisms as the most important within the Swiss political and administrative system:

a) The resolution of conflicts through parliamentary motions or referendums⁵⁴

In Switzerland a vote is taken when consensus is not achieved following lengthy negotiations. The principle of majority rule through parliamentary and/or direct democracy provides a solution for many disputes in Switzerland.

The area of environmental policy is no exception and there are numerous examples in this area. For example, the result of a legally required referendum, forced the authorities within a canton to let the citizens decide the most environmentally friendly incineration technology. This meant that a very long drawn out dispute among experts was solved over a short weekend in June 1993, when the people voted for a new refusal incineration plant of the "thermoselect company."⁵⁵

In another case following slow-moving negotiations, a coalition of environmental groups and political parties, mainly from mountain cantons, initiated 1990 a referendum with regard to the acceptability of transit on alpine roads. The aim of this referendum was to reduce the transit traffic on the alpine roads within the next 10 years by shifting the majority of the transit traffic on the rail network. In 1993 the Federal Assembly decided to make no counterproposal⁵⁶ against this referendum and to recommend the

⁵² *Environmental Mediation in Europe-Status and Experiences; Procedures for Resolving Environmental and Water Management* (2000) (Austria: Federal Ministry of Agriculture and Forestry, Environment and Water Management, Department of EU Affairs) 56.

⁵³ Knoepfel, *The Wide Range of Negotiation Forms Used in the Resolution of Conflicts in Switzerland*, in: Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) sigma (Germany), at 274 et seq..

⁵⁴ Ibid.

⁵⁵ Parlamentarische Initiative Kehrrechtverbrennungsanlage (KVA) des Kantons Tessin <http://www.admin.ch/ch/d/ff/2003/8025.pdf> (accessed on 14 August 2005)

⁵⁶ Section 139 (5) of the Constitution provides that the Federal Assembly recommend the electorate to accept or to reject the initiative. In case it recommend the electorate to reject the initiative the federal assembly has the freedom to make counterproposal.

electorate the rejection of the initiative. On 20 February 1994 the electorate voted with 52% for the shift of the transit traffic on the rail network.⁵⁷

In this case (and numerous other cases), processes of more or less intensive negotiations were abruptly broken off and resolved by the citizens through referendum.⁵⁸

b) Decision by a judge⁵⁹

The administrative court procedure which is to speak the standard procedure used in the resolution of environmental conflicts in the Federal Republic of Germany is less common in Switzerland. This is due, on the one hand, to the fact that in contrast to the Basic Law (constitution) of the Federal Republic of Germany,⁶⁰ the Swiss legal system does not recognize any general clause providing for legal protection through the Administrative Courts.⁶¹ In accordance with Article 97 ff. of the Federal Act of December 1983 on the organization of federal justice administration (OG-Bundesgesetz über die Organisation der Bundesrechtspflege), certain important decisions which are of significance for environmental law cannot be accessed through administrative court procedures. In these cases, legal disputes must be resolved by the Federal Council. This was for example the case in the highly controversial appeal against the authorisation granted for a second high-voltage cable across the Gemmi Pass which was ultimately decided by the Swiss Department of Justice and the Police and not by the Administrative Court.⁶²

c) Co-operative solutions⁶³

The implementation of the Swiss Environmental Protection Act of 7 October 1983 (USG-Bundesgesetz über den Umweltschutz) and the numerous decrees issued by the cantons in terms of that Act has led to unpredictable informal administrative decisions in the area of redeveloping former waste disposal sites. In most cantons, a formal

⁵⁷ CH Politik 1990-2001 <http://www.anneepolitique.ch/docu/CHPolitik1990-2001.pdf> (accessed on 14 August 2005).

⁵⁸ Knoepfel, op cit 53, at 275.

⁵⁹ Ibid.

⁶⁰ Article 19 (4) of the Constitution of the Federal Republic of Germany.

⁶¹ Environmental Mediation in Europe, op cit note 52, at 57; Knoepfel, op cit note 53, at 275.

⁶² Article 99 of the Organisation Act.

⁶³ Knoepfel, op cit note 53, at 276.

redevelopment procedure as prescribed in Article 16 of the Act has yet to be established. The sole provision in the redevelopment procedure is that the industrial and commercial concerns must submit redevelopment proposals to the cantonal authorities by a specified deadline. These proposals can generally be clarified to the satisfaction of the authorities and plant operators in the course of negotiations. There have been few instances whereby definitive orders for individual and special redevelopment measures have been opposed and rejected by operators.

d) *Professionalisation and standardization*⁶⁴

Some environmental conflicts, which as recently as a few years ago, would have been dealt with through long drawn out processes, can now be dealt with considerably greater ease due to the fact that a common language for conflict has been developed. This means that misunderstandings which used to occur regularly, can now be resolved relatively speedily. This development can be explained on the one hand by the standardization of pollution quality standards and on the other hand by the ecological professionalisation of personnel at the national environmental protection agencies, environmental organizations and the representatives of industry and commerce. Finally, a professionalized service in the areas of the culture of dispute and conflict regulation technologies has been established recently.⁶⁵

e) *Avoidance of conflict*

If all conflicts in Switzerland were solved through negotiations, ballots, legal proceedings, cooperation or the professionalisation of personnel, Switzerland would not exist. On the contrary, Switzerland, with all its conflicts, has survived very precisely because all of the Swiss authorities from the local to the federal have developed a variety of strategies to avoid taking unilateral decisions on controversial matters.⁶⁶ It would appear that it is easier to live with the – all too familiar – implementation deficits in some

⁶⁴ Ibid.

⁶⁵ Weidner, Der verhandelnde Staat. Minderung von Vollzugskonflikten durch Mediationsverfahren?, in: *Schweizerisches Jahrbuch für politische Wissenschaften* 33 (1993) 240.

⁶⁶ Knoepfel, op cit note 53, at 277.

well-known cantons, with the more or less familiar translation errors in German, Italian and French legal texts and with the open or concealed federal illegalities in the administrative practices of one or another canton, than to pursue relentlessly and at any price a solution for every individual conflict.⁶⁷ The nudge and the wink, the alleged "oversight", or a positively ingenious application of the perspective limited to arbitrary cases⁶⁸ by federal authorities and the federal legal system can be viewed as the instruments of this kind of conflict avoidance strategy.

The Swiss have made very little use of mediation to resolve environmental disputes.⁶⁹ However, if one adopts a wide definition of mediation it can be seen that the political-administrative system includes a wealth of institutionalised procedures of consent-building at all levels. Therefore, it is difficult to identify mediation solutions in the strict sense and to distinguish them clearly from the other instruments used in Switzerland to reach consensus.⁷⁰

For all these reasons, Knoepfel⁷¹ even goes as far as to say that there is not much need for mediators in Switzerland because its entire political and administrative culture and institutions are suffused with numerous negotiation elements. In his opinion, for the present and the immediate future, the value of mediation processes will remain negligible because, despite extensive potential for conflict - which in comparison to other countries is also a fundamental aspect of Swiss life - the national and cantonal authorities provide for forms of negotiation in a more or less regulated form. He continues that in most instances there is no need for a mediator as a neutral, negotiating person who helps in the resolution of environmental conflicts. He even thinks that in many cases such an

⁶⁷ Ibid.

⁶⁸ Article 4 of the Swiss constitution provides the so called "restricted perspective of arbitrariness". This means that an appeal in front of the Federal Court against a decision of a cantonal administrative court is only possible if the applicant can prove that the decision of the cantonal Administrative Court was arbitrary. Thus the restricted perspective of arbitrariness offers the Federal Court a wide administrative discretion and another instrument for the avoidance of conflicts.

⁶⁹ Cavigelli, *The Working Party on Reprocessing in the Swiss Conflict Resolution Procedure on Radioactive Waste*, in Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries (1998)* sigma (Germany), at 299.

⁷⁰ *Environmental Mediation in Europe*, op cit note 52, at 56.

⁷¹ Knoepfel, op cit note 53, at 277.

institution would probably face rejection, as it would be interpreted as a confession by the traditional and new institutions, and also the major parties to the conflict, of their inability to reach an independent resolution of their disputes. Third party intervention could be seen as undermining those with authority to make decision or reach consensus and therefore the intervention would be seen as intrusion rather than assistance.

Knoepfel's statement that the parties involved usually engage in direct negotiations without any third party needs to be qualified.⁷² He, himself, and Sonja Waelti report on procedures that have included a neutral third party.⁷³

Waelti also does not share Knoepfel's general opinion that Switzerland does not need environmental mediation.⁷⁴ On the contrary, she thinks that the Swiss decision-making system offers a good basis for mediation procedures, especially in areas of politics where there is yet little participation, for example the non-governmental implementation of political decisions.⁷⁵ In her opinion the Swiss decision-making process, with its manifold options for vetoes and interventions, could be improved by mediation in terms of duration and efficiency if a kind of round table with a stable basis was established for early-phase negotiations involving also individuals persons and groups without links to formal procedures and informal committees, which much influence the decision-making process in Switzerland.⁷⁶

In now examine different cases in Switzerland, which included mediation, or a similar procedure in different fields. Most of these processes cannot be described as mediation in the strict sense, but they are in my opinion important to offer the reader a better understanding of the Swiss political culture where negotiated solutions and other forms of consensus-building mechanisms are already widespread. Furthermore, most of these processes are comparable with mediation as they involve a

⁷² Environmental Mediation in Europe, op cit note 52, at 57.

⁷³ Knoepfel, op cit note 53, at 254; Waelti, op cit note 51, at 288 and Environmental Mediation in Europe, op cit note 52, at 57.

⁷⁴ Waelti, op cit note 51, at 296 et sqq..

⁷⁵ Ibid.

⁷⁶ Environmental Mediation in Europe, op cit note 52, at 58.

neutral third party functioning as a moderator or an independent project manager in some form.⁷⁷

C.2 Processes in Switzerland which involve Mediation or Mediation-type Activities

The conflict resolution processes presented here all focus directly or indirectly on the area of environmental policy. The specific sectors involved include waste management, energy, nature conservation and transport.

C.2.1 Waste

This section includes two sample cases from the large number of ongoing and completed conflict management processes surrounding the designation of locations for waste management facilities in Switzerland. Each of the two cases involved hazardous waste treatment plants which, under Article 30 (3) of the Swiss Environmental Protection Act, must be constructed on Swiss soil as the export of hazardous waste is now entirely prohibited.⁷⁸ The controversy surrounding the construction of such plants is not solely concerned with the choice of environmentally friendly technology for the plants. Due to additional pollution effects caused by the operation of such plants (increased traffic, impact on the countryside, etc.), the choice of the actual sites for the construction of plants using non-controversial technology generally also gives rise to other conflicts. There is no need to emphasize the fact that in such cases local minorities often have to endure disproportionate disadvantages so that the service in question can be provided for the majority. Thus, in general it can be said that the affected minority is not automatically prepared to make this sacrifice.⁷⁹

C.2.1.1 The Licensing Procedure for the CIBA-GEIGY Hazardous Waste Incineration Plant in Basle-Town⁸⁰

In this first case, which started in summer 1985 and came to a successful conclusion in May 1991, well-known Swiss pharmaceutical

⁷⁷ Ibid., at 56.

⁷⁸ Knoepfel, op cit note 53, at 261.

⁷⁹ Waelti, Neue Problemlösungsstrategien in der nuklearen Entsorgung, in: *Schweizerisches Jahrbuch für Politische Wissenschaften* 33 (1993) 211.

⁸⁰ Knoepfel & Zuppinger *Usine d'incineration de déchets spéciaux* (1996) Etude de cas de l'IDHEAP 7.

companies faced opposition from eleven groups. The groups came from the immediate locality of the proposed site for the plant,⁸¹ neighbouring Germany,⁸² the canton of Basle-Town⁸³ and all over Switzerland.⁸⁴ In addition to the Co-ordinating Office for Environmental Protection of the Canton of Basle Town, which was responsible for the allocation of the license, the authorities involved also included the Director of the Basle Town Building and Construction Department and the Basle-Town Administrative Court.⁸⁵ The supporters of the plant included the Swiss Commission for Waste Management, the Federal Office for the Environment, Forests and Landscape and the neighbouring canton of Basle-County, which expressed interest in using the facility for the incineration of its own hazardous waste. Finally, several more or less neutral ecology departments were also involved in this process. It was one of these neutral ecology departments, which suggested an alternative procedure to resolve the existing conflict.⁸⁶

Following bitter open conflict between one of the pharmaceutical company and its opponents, particularly the Germans, who repeatedly raised the issue of dioxins, an agreement was reached on this highly controversial issue. This was ultimately possible because following the initial negotiations with its opponents (against the difficult background of an chemical incident in November 1986, in which one of the pharmaceutical companies was involved) the pharmaceutical companies set the highest possible technological standards for the plant, and began to conceive the project not merely as a company project but as a regional project and hence a public service. In my opinion this change from profit-driven to public service must be seen in connection with the bad reputation of the pharmaceutical company among the population caused by the chemical incident in November 1986. The opponents finally withdrew their Administrative Court appeal when a written agreement had

⁸¹ Aktion Selbstschutz (Self-Protection Action Group) and Gruppe Sondermüllöfen-Gegner (SMOG) [Opponents of the hazardous waste incinerator].

⁸² Morgenluft [Morning Air] pressure group (Weil am Rhein), Loerrach Regional Authority [Landratsamt], Weil am Rhein Municipal Authority, Freiburg Regional Council (Regierungspraesidium), SPD Baden-Württemberg.

⁸³ World-wide Fund for Nature (WFN) Basle Section, Social Democratic Party of the Canton of Basle-Town.

⁸⁴ WFN Switzerland, Democratic Jurists [Demokratische Juristen].

⁸⁵ See Knoepfel, op cit note 53, at 262.

⁸⁶ Ibid., at 261.

been signed between them and the pharmaceutical companies. In this agreement, the pharmaceutical company undertook to observe more stringent quality standards for particulate matters and different exhaust emissions than those prescribed in the federal and cantonal legislation. It was also agreed to implement permanent monitoring of air pollutant emissions. The environmental organisations were involved in the observation of the quality standards.⁸⁷ Although no actual mediator emerged in the course of this process, the director of the Co-ordinating Office for Environmental Protection of the Canton of Basle Town, who held intensive individual and round table discussions with the various partners in the conflict, and finally succeeded in getting the participants to compromise, did play a key role in the process.⁸⁸

C.2.1.2 Designation of a Site for a Landfill for Incinerated Residual Waste in the Canton of Aargau

The designation of a site for a landfill for incinerated residual waste in the canton of Aargau took place from the end of 1992 to the end of 1993.⁸⁹ 27 of the 32 sites originally proposed were eliminated in the first two stages of the procedure. The procedure then continued by institutionalising a so called “democratic co-operation process” among the local authorities in the areas where sites were still under consideration. These groups were established by a team of experts from the Technical University of Zurich, which also acted as supervisor.⁹⁰ For a period of six months, 80 residents from the affected areas, divided into four commissions, worked on an evaluation of the sites. Their work resulted in a recommendation for the further processing of the projected sites to a delegation of officials, which consisted of representatives from the state administration under the direction of the cantonal minister for public works.⁹¹

This process also did not use mediation in the strict sense of the word. The project director provided specialist supervision on the side of the canton, and the Technical University project group were responsible

⁸⁷ Ibid.

⁸⁸ Ibid., at 262.

⁸⁹ Ibid., at 264.

⁹⁰ Ibid., at 265.

⁹¹ Ibid.

for the implementation of the consensus-building process without itself taking on the role of neutral mediator. This form of alternative dispute resolution could be best described as political dialogue supported by project management.⁹²

C.2.2 *The Energy Sector: Upgrading of the Major “Cleuson/Dixence Hydro-electric Station” in the Canton of Valais*⁹³

The following process concerns the use of hydro-electric power, which is the primary source of electricity production in Switzerland. In this case the company implementing the project⁹⁴ had the support of the canton where the hydro-electric station was situated but faced strong opposition from WFN (World-wide Fund for Nature).⁹⁵

On 4 November 1992, the environmental protection organisations signed an out-of-court settlement prior to the termination of appeal proceedings at the Federal Court. In the out-of-court settlement, the environmental organisations undertook not to exercise their right of appeal against the planned increase in the station’s operating capacity for the generation of electricity to meet peak-time demand⁹⁶. In return, the project company and the canton undertook to provide several services for the benefit of the public, including:

- the securing of undetermined water through exclusion of various streams from the power station water system;
- the creation of an ecological compensation area in the valley floor, and its designation as a nature conservation zone with the involvement of an equal representation commission;
- study of the effects of construction work and operation of the power station on the Rhone water system
- and the creation of biotope zones in different areas.⁹⁷

In this instance, the institutional pressure in the form of the imminent Federal Court judgement, the outcome of which neither side could comfortably predict, lead the involved parties to a negotiated

⁹² Ibid.

⁹³ Knoepfel, Eberle, Gerhauser & Girard *Energie und Umwelt im politischen Alltag. Drei Fallstudien für den Unterricht* (1995) Eidg. Drucksachen- und Materialzentrale (Switzerland) 21 et sqq; Knoepfel, op cit note 53, at 265-266.

⁹⁴ Ouest-Suisse SA and Grand Dixence SA.

⁹⁵ Knoepfel, Eberle, Gerhauser & Girard, op cit note 93, at 21.

⁹⁶ Knoepfel, op cit note 53, at 266.

⁹⁷ Ibid.

solution in the aforementioned form. Thus, in this case there was no need for actual mediators to invite the parties to meet at the negotiation table.⁹⁸ Unfortunately this kind of institutional pressure plays still a marginal role in Switzerland and the parties still prefer to resolve environmental disputes by court decisions, even though the outcome of such decisions are almost always unpredictable.

C.2.3 Nature Conservation

In 1987, the Swiss parliament passed a revision of the 1966 Federal Act on the Conservation of Nature and Protection of Habitats (NHG-Bundesgesetz über den Schutz von Natur und Heimat). This Act provides a legal basis for implementing the protection of biotopes through the passing of the relevant inventories (Article 18a).⁹⁹ In accordance with the provisions of this Act, the Federal Council passed three decrees: one on the protection of raised bogs and carrs¹⁰⁰ of national importance, another decree about the introduction of regulations on the protection of lowland moors of national importance, and a further decree on the protection of moor landscapes of exceptional beauty and national importance. As a result of the implementation of these decrees, a total area of 1126 km² is to be protected through special measures to be implemented by the cantons.¹⁰¹

This amount of protective federal legislation led to the emergence of an opposing faction in the affected cantons because the affected cantons felt limited in their right of self determination. In 1992 and 1993, the opposition took the form of five initiatives in the respectively affected cantons, which led the relevant National Council commission to pass a motion demanding the mitigation of the absolute protection of the moorlands provided under the revision of the relevant article of the constitution.¹⁰² The affected cantons protested against what, in their opinion, were too generously drawn-up perimeters¹⁰³ for the designated

⁹⁸ Ibid.

⁹⁹ Knoepfel, *Von der konstitutionellen Konkordanz über administrative Konsenslösungen zum demokratischen Dezisionismus*, in: Knoepfel (ed.), *Lösung von Umweltkonflikten durch Verhandlung. Beispiele aus dem In- und Ausland* (1995), at 305.

¹⁰⁰ Carr woodland represents a late successional stage of a wetland ecosystem, very much dependent on local hydrology and land use pressures, but typically derived from open fens or marshes, as they begin to dry out.

¹⁰¹ Knoepfel, op cit note 53, at 268.

¹⁰² Knoepfel op cit note 99, at 306.

¹⁰³ The boundary of a closed plane figure, or the length of this.

nature reserves and against the extreme limitation of land uses in these areas.

This protest led the Federal Office for the Environment, Forests and Landscape to join forces with the Swiss tourism organization and to establish a working group. This working group aimed to bring together the different interests in the areas of landscape and moorland conservation, tourism and agriculture.¹⁰⁴ A survey by the Federal Office for the Environment, Forests and Landscape and the farmers' association, which was carried out with regard to the care and maintenance of moorlands and the resulting loss of income for agriculture, identified annual costs of around 28 million Swiss francs. A legal basis for the compensation of 90 per cent of losses in the agrarian sector was finally established under the terms of the revision of the Federal Act on the Conservation of Nature and Protection of Habitats.¹⁰⁵

As in the controversial case of the crop rotation plots,¹⁰⁶ the cantons perceived the one-sided definition of the protective boundary provided by officials of the Federal Government as a genuine insult. They were not prepared to accept the conservation requirements, which were becoming more and more restrictive, and the federal inventory, which in many instances impinged on their territory. Thus, in the course of 1993, official representatives of the Swiss nature conservation and countryside protection authorities had to face various sessions at which they found themselves the target of wild accusations from the cantonal regional development, financial, and even the nature conservation authorities. Approximately 90 protected objects were discussed during these meetings, and in most cases the relevant (geographical) boundaries were adjusted in favour of the cantons, or the land use regulations were relaxed somewhat.¹⁰⁷

C.2.4 Transport

In 1979 the Swiss deputies passed a motion arising from a petition by environmental protection activists in the canton of Valais, demanding

¹⁰⁴ Knoepfel, op cit note 53, at 269.

¹⁰⁵ Knoepfel, op cit note 99, at 307.

¹⁰⁶ On the extreme conflict between the national, cantonal and local authorities, cf. case study in: Zimmermann & Knoepfel *Umwelt und Landwirtschaft im politischen Alltag. Drei Fälle für die Schule* (1987) Eidg. Drucksachen- und Materialzentrale (Bern), at 1 et sqq.

¹⁰⁷ Knoepfel, op cit note 53, at 270.

the redesign or reduction of the motorway from central Valais to northern Valais.¹⁰⁸ On the basis of this motion the Federal Office for Road Construction nominated a Professor from the Technical University in Lausanne to examine the layout of the motorway. The mandate included a study of the general layout and capacity, the number of motorway feeders and the links between the new road and the cantonal road network. In addition, part of this study was also to analyze current and future transport requirements and the effects of the work on the environment, landscape, agriculture and tourism, road safety and the cantonal economy.¹⁰⁹

Without any knowledge of the instrument of mediation the professor subdivided the controversial stretch of motorway from central Valais to northern Valais into eight partial stretches which he then re-evaluated one by one on the basis of an repeated process. He then formed regional citizens groups with representatives of the various interested groups (offices of the cantonal administrations, farmers, environmental protection organizations) and the local authorities for each partial stretch of motorway. These groups started by developing different variants, which were subjected to a technical feasibility study.¹¹⁰ The following step involved the evaluation of the variants by regional groups. The three variants with the best results were finally used as a basis for planning drawings produced locally by members of the professor's team and then evaluated again by the regional groups.

The professor's approach resulted in achieving significant improvements in the layout of the road, which with one exception were accepted by the opposition. As a result of this, most of the proposals developed by the professor were passed under the standard planning permission procedure without difficulty. This procedure comes probably closest to environmental mediation in the strict sense.¹¹¹

¹⁰⁸ Ibid., at 271. In 1979, there existed only plans for the design and lay-out of the motorway from central to northern Valais.

¹⁰⁹ Knoepfel, op cit note 99, at 310.

¹¹⁰ Knoepfel, op cit note 53, at 272.

¹¹¹ Knoepfel, op cit note 99, at 311 et sqq.

C.2.5 Discussion

On the basis of the aforementioned fields in which environmental mediation or a similar procedure has been applied in Switzerland, one can say that environmental mediation has gained further ground in recent years. Nevertheless, environmental mediation in the strict sense remains well known only to several experts in Switzerland while public awareness is still low.¹¹² This limited knowledge of environmental mediation exists in Switzerland because parties involved in an environmental dispute have numerous other options for advocating their interests in environmental policy planning and measures.¹¹³

This shadowy existence of environmental mediation in Switzerland points to a risk that arises when environmental mediation is applied in Switzerland. It is the risk that inadequately trained moderators organize and chair the mediations, so that the idea of mediation as a whole might be discredited for the parties involved.¹¹⁴ This problem has been identified and several universities and academies now offer education on mediation and environmental mediation.¹¹⁵ Only the future will show if trained mediators will help to promote mediation in Switzerland to resolve environmental disputes.

C.3 Case Study

In this section I want to complement the overview in section C.2 with a specific case in respect of the "mediation experiences" in Switzerland over nuclear waste disposal. It is important to highlight at this point that the procedures discussed in this section were never officially called mediation, although the procedure chosen at central government level and at the proposed site does exhibit most of the features of a mediation procedure.¹¹⁶

C.3.1 Overview

I have chosen this field for my case study for the following reason: In Switzerland, the disposal of nuclear waste has been delegated to the National Association for the Disposal of Radioactive Waste (NAGRA-

¹¹² Environmental Mediation in Europe, op cit note 52, at 58.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

Nationale Genossenschaft für die Lagerung radioaktiver Abfälle), which is in fact a semi-private organization. This delegation of the responsibility for implementation to a parastatal institution makes procedural integration of the potential opposition impossible.¹¹⁷ Thus, the normally common negotiation and consensus mechanism does basically not take place.¹¹⁸ In contrast to the authorities which incorporate competing interests directly into the planning process, parastatal organizations do so only when forced by increased pressure from outside to do so.¹¹⁹

The National Association for the Storage of Radioactive Waste was founded in 1972 by the national authorities, electricity companies and nuclear power station operators. In March 1982 the association published a list of possible sites for the ultimate disposal of low and medium level radioactive waste.¹²⁰ In a referendum in 1990 the Swiss decided to place a moratorium on construction of new nuclear power plants. This decision marked an about-turn in national policy on energy and waste disposal.¹²¹

Based on this decision and on the energy clause in the Swiss Federal Constitution, the "Energy 2000" plan of action was launched in early 1991 by the Federal department of traffic and energy (EVED-Eidgenössisches Verkehrs- und Energiedepartement). One of the many elements in this programme was the federal government's efforts to soften the hardened fronts in the question of radioactive waste disposal by engaging the different groups (energy industry, environmental organizations, central government, cantons and local authorities) in dialogue.¹²²

In summer 1993, the National Association for the Storage of Radioactive Waste announced its choice for an underground final disposal facility for low and medium grade radioactive nuclear waste of the 4 existing nuclear power station of Switzerland. Shortly afterwards, it submitted an application for a framework license to build the disposal

¹¹⁶ Waelti, op cit note 51, at 282.

¹¹⁷ The autonomous position of NAGRA does make an efficient and goal-oriented approach easier, but its position as a political monopoly weakens its capacity to learn and adapt to the participatory demands of society.

¹¹⁸ Ibid., at 281.

¹¹⁹ Linder *La décision politique en Suisse. Genèse et mise en oeuvre de la législation* (1987) 195-197.

¹²⁰ Waelti, op cit note 79, at 211.

¹²¹ Waelti, op cit note 51, at 283.

¹²² Cavigelli, op cit note 69, at 299.

facility at Wellenberg, a mountain in the canton of Nidwalden.¹²³ Permission was granted by the national authorities. The Federal Council's decision to award framework authorization was to have been submitted to the Swiss parliament, and this was to have been followed by further authorization procedures at cantonal and local authority level, as required by the federal political system of Switzerland.¹²⁴ The choice of a site brought a new dynamic into the nuclear waste disposal conflict and on the basis of the aforementioned changed climate surrounding energy policy, effort were made to initiate mediation not only at central government level but also at the proposed site of the planned disposal facility.

C.3.2 *The significant parties to the conflict*

Two reasons led a large number of parties being involved in the disposal conflict. The first reason is the federal structure of the political decision-making process in Switzerland. The second reason is its parastatal implementation.¹²⁵ The environmental organizations and the authorities that were involved were represented by different actors at different levels. The environmental organizations at central government level included the Swiss Energy Association (SES-Schweizerische Energiestiftung) and Greenpeace while at cantonal level cantonal environmental and civil rights groups were involved. Finally, at local level local opposition took the form of fairly loosely structured pressure groups. Contacts between the groups at different levels were in general sporadic and informal.¹²⁶ The formation of the state parties also varied from level to level. At central government level, the Federal Agency for Energy Management¹²⁷ and the control organs were directly involved in the dispute whilst at the cantonal level it was the government which was the main actor. At local level it was the local council which represented the interests of the local authorities. Compared to the environmental organizations and the authorities, NAGRA as the operator of the planned nuclear waste

¹²³ Waelti, op cit note 51, at 282.

¹²⁴ Knoepfel, op cit note 53, at 261.

¹²⁵ Waelti, op cit note 51, at 282.

¹²⁶ Ibid., at 283.

¹²⁷ The Federal Agency for Energy Management (BEW) is an executive branch of Federal Government (Bundesrat).

disposal presented, at all three different levels, the only constant participant.¹²⁸

C.3.3 *Mediation efforts at central government level*

C.3.3.1 Preparing the first conference on disposal and how it progressed

The central government commissioned collaboration between the environmental organizations and the Federal Agency for Energy Management by organizing the first conference on disposal in 1991. The parties decided to hold a one-and-a-half-day conference to discuss different topics, including: a waste inventory and the form of the waste, plans for the disposal of nuclear waste and the safety of final disposal facilities. Meanwhile the question of the imminent selection of a site and the questions of general energy policy were explicitly excluded from the agenda.¹²⁹ This exclusion was on the one hand very important because the positions of the parties with regard to this question were so far away from each other that a mediation process on this topic was impossible. On the other hand it was highly controversial to separate the more value-driven energy policy from the mediation process. It cannot be expected that such a fundamental value conflict can be eliminated in a mediation process about the disposal of nuclear waste.

The four groups of participants: the operators, authorities, environmental organizations and specialists, were asked to submit a list of potential participants. The groups agreed that the disposal conference would be private and confidential to facilitate the free exchange of ideas in a risk-free environment. The aim of this first conference was to identify relevant topics and differing points of view. Those topics on which there was agreement would be handled first, the remaining areas of conflict would then be dealt by the committee, the so-called conflict resolution group on radioactive waste, which was elected by the participants of the first disposal conference.¹³⁰

The first disposal conference was held in November 1991. The participants were, apart from the rapporteur and the chair¹³¹, almost 30

¹²⁸ *Ibid.*, at 284.

¹²⁹ *Ibid.*, at 285.

¹³⁰ *Ibid.*

¹³¹ Who might also be termed the mediator.

people. The conference was divided in three sessions. In the first session, the primary subject under debate was reprocessing. The participants identified several issues on which there were different opinions but agreed that the question of reprocessing did contain enough scope for negotiation to make a joint approach possible. It was decided to hold a scenario analysis session and to organize a joint fact-finding trip to a reprocessing plant in England.¹³²

The second session dealt with the question of whether a final disposal solution for nuclear waste was preferable to a long-term interim storage solution.¹³³ The participants agreed that permanent isolation of the waste from the biosphere using geological disposal facilities is the best solution but the environmental organizations wanted direct monitoring and complete retrieval of the waste to be guaranteed for as long as possible. The session ended in a heated dispute on the question of what constituted a good site.¹³⁴

The discussion in the third session, on the safety of final disposal facilities, was also quite conflictual and there was a certain undercurrent of aggression. This was especially the case when it came to questions of reprocessing and siting.

The participants in this first disposal conference then elected a committee, the so-called conflict resolution group on radioactive waste, composed of a representative from each of the parties along with the "mediator". The committee consisted of seven people. Two representatives from the environmental organizations, two representatives from the operators, two representatives from the authorities and a scientist from a nuclear energy research body. Its functions were to work on controversial topics and to prepare further disposal conferences.¹³⁵

¹³² Waelti, op cit note 51, at 285.

¹³³ A long-term interim storage solution means that nuclear waste is stored over an undefined period in the same place (for example in a store) because a final disposal storage for which the safety standards are much higher, is yet not established in Switzerland.

¹³⁴ Waelti, op cit note 51, at 286.

¹³⁵ Cavigelli, op cit note 69, at 300.

C.3.3.2 The work of the Conflict Resolution Group

Among all the topics, which had arisen during the disposal conference the Conflict Resolution Group on radioactive waste first set up a working party to look at the question of reprocessing. The function of this working party was to undertake a literature study and draw up a list of criteria for decision making. The other topics were deferred to a later date.¹³⁶

In summer 1992 the Conflict Resolution Group on radioactive waste established another working party. The function of this new group was to look at final disposal with long-term interim storage and to compare surface disposal with underground disposal.

The working party on reprocessing held ten one-day meetings between March and December 1992. Overall, there was a good, co-operative working atmosphere among the members of the working party. There was also some degree of understanding on certain controversial issues.¹³⁷ The working party on reprocessing was the only one to continue working within the framework of the conflict resolution group on radioactive waste. A joint final report on reprocessing was prepared and given to the individual actors for review and ratification. However, the report was in the end never approved by the Conflict Resolution Group on radioactive waste, since shortly afterwards, the environmental organizations withdrew from the group, after the central government granted permission for the expansion of a nuclear power station (the Federal Council authorized an increase in the capacity of one of the nuclear power stations), which resulted in the collapse of the whole waste disposal procedure.¹³⁸

The second working party on disposal techniques was only able to hold a constituting meeting in December 1992 before talks were broken off.¹³⁹ The need for the safe disposal of radioactive waste was not disputed by anyone, but the 's decision destroyed the trust of the environmental organizations. Furthermore, waste disposal policy not only met with

¹³⁶ Waelti, op cit note 51, at 286.

¹³⁷ Ibid., at 287.

¹³⁸ Cavigelli, op cit note 69 at 299.

¹³⁹ Waelti, op cit note 51, at 287.

strong resistance from environmental organizations but also from the local authorities and affected cantons.

C.3.3.3 Chairing of the Discussion, Mediator

Professor Jakob Nuesch acted at the disposal conference and in the Conflict Resolution Group on radioactive waste as mediator. Although he has no specific expertise in the field of nuclear waste disposal, he is a microbiologist and was able to follow the scientific debate and was accepted without discussion by all the participating parties. During the disposal conference, he played the role of discussion facilitator and intervened only to give the floor to different speakers and to make the link from one session to the next. In Waelti's view he fulfilled his function as a mediator in a very low-key, but competent manner.¹⁴⁰

The mediator's lack of special expertise on the subject and experience as a mediator was not a negative factor during the disposal conference, even though he did show some uncertainty in recognizing lines of conflict at various points in proceedings. He played a similar function within the Conflict Resolution Group on radioactive waste but he functioned more actively as mediator than in the disposal conference. He acted not only as chairman and facilitator but also held caucuses with the individual parties and organized small discussion groups. Thanks to his competent manner it was possible repeatedly to resolve the conflict over the controversial participation¹⁴¹ of a specific environmental organization (Greenpeace).¹⁴² However, in the end mediation efforts at central government level failed and it raises the question why.

C.3.3.4 Reasons for the failure of the national mediation procedure

A generally accepted prerequisite for successful mediation is that all participants involved in the conflict believe that the process and the outcome could be beneficial to them. This condition was only partially fulfilled. Both representatives of the operators had no hopes of gaining anything from the procedure while the environmental organizations mainly

¹⁴⁰ Ibid., at 288.

¹⁴¹ The participation of Greenpeace was controversial because there was a fear that Greenpeace might take advantage of the conference to launch a media campaign. A compromise was reached when Greenpeace agreed to submit a declaration stating that they would adhere to the agreed ground rules.

hoped that their point of view would gain greater importance during the discussions and the authorities hoped primarily for improved communication. None of the parties feared that the procedure would place them at a greater disadvantage. The main concern of both the environmental organizations and the operators was that the procedure would be inconclusive and therefore a waste of time.¹⁴³ Since it was not to be expected that fundamental value conflicts with regard to energy policy in Switzerland would be eliminated, a willingness to negotiate on certain aspects of the conflict, entailing not a shift in the position but a balancing of interests, would have been necessary for a successful outcome.¹⁴⁴ In my opinion many of the participants did not want to be the spoilsports in the procedure and thus anticipated in the mediation process. But the mediator also missed the opportunity during the procedure to reassure the participants that the process was at risk and to explain the disadvantages of a failure of the process.

However, Waelti¹⁴⁵ identified the following three main reasons for the failure of the national attempt at mediation to resolve the dispute over the disposal question:

- 1) *"The form and the aims of the mediation procedure were not defined with sufficient clarity and consensus.*
- 2) *The procedure proved to contain insufficient scope for negotiation, which prevented the demands and concessions from being packaged.*
- 3) *The failure was due to a lack of pressure to succeed, at a decisive stage in the conflict most parties found the "exit" the more comfortable option in many ways, at any rate preferable to sitting down at the negotiating table to try and resolve the dispute."*

One reason, which can be highlighted, clearly is the failure to define the ground rules and aims of the procedure. A clear formulation of goals for the procedure was never drawn up. Most likely the participants feared that such a definition of ground rules and aims of the procedure would lead to deadlock before the mediation process had even begun. Therefore the

¹⁴² Waelti, op cit note 51, at 288.

¹⁴³ Cavigelli, op cit note 69, at 301.

¹⁴⁴ Waelti, op cit note 51, at 289.

¹⁴⁵ Ibid., at 288 et sqq..

goals were defined differently from party to party and ranged from “talking to one another” or “breaking down stereotypes” to relatively concrete implantation goals, such as abandoning reprocessing completely. The missing of a common formulation of goals led to heated discussion throughout the whole procedure.¹⁴⁶

Another reason for the failure was that nuclear waste disposal policy offered insufficient scope for negotiation with regard to the already advanced stage of the decision making process. At the time of the talks, unofficially at least, the site had already been selected. In the end one can say that the failure of the procedure makes it clear that for some of the parties unilateral action promised a greater chance to push through their interests.¹⁴⁷ Especially the government manifested with its decision to expand the nuclear power plant, before the talks had even begun, that they see a real chance in unilateralism to solve the dispute. Looked at in terms of the parties BATNA’s (Best Alternatives to a Negotiated Agreement),¹⁴⁸ the resignation of the environmental organizations would at first sight seem to indicate that, following the state’s decision to expand the nuclear power plant, they considered their chances of success to be better outside the co-operative procedure than at the round table.¹⁴⁹ The behavior of the government during the mediation process leads to an opposite conclusion. The decision of the government in the middle of the mediation process to increase output at a nuclear power station leads to the conclusion that they had fallen below their BATNA, otherwise there is no explanation for this “breach of trust”. At this stage of the procedure it was probably only the NAGRA which did not fall below their BATNA since what this organization fears the most is the ongoing mobilization and uncertainty resulting from public referendums.¹⁵⁰

¹⁴⁶ See Cavigelli, op cit note 69, at 301.

¹⁴⁷ Waelti, op cit note 51, at 290.

¹⁴⁸ Susskind & Cruikshank op cit note 34, at 81 et sqq.; The BATNA model shows that successful transition from procedures based on conflict to ones based on co-operative problem-solving is dependent on successfully presenting each party with potential gains that lie over their own BATNA values.

¹⁴⁹ Brunner, *Energiefrieden: Grundmauern erschüttert*, in: *Energie + Umwelt 1* (1993) 4-5; Waelti, op cit note 51, at 290.

¹⁵⁰ Waelti, op cit note 51, at 290. The fear of the NAGRA is justified. Since the nuclear catastrophe in Chernobyl the population of Switzerland is very sensitive with regard to nuclear matters. A referendum with regard to a nuclear matter would thus probably receive the necessary support of the population.

C.3.4 *The Mediation Procedure at the Proposed Site (Wellenberg)*

The government of the canton planned to locate a nuclear disposal facility. But this met with vehement resistance from its population. As the federal political system of Switzerland requires authorization procedures for a nuclear disposal facility not only at central government level but also at cantonal and local authority level the Government of the canton sought to increase public participation hoping to mitigate this fierce opposition. For this purpose it set up in the summer of 1994 the Wellenberg Working Party.

The working party not only included experts but also the political parties, interest groups and the local authority for where the disposal facility was to be sited. All members of the group were in at least indirect relationship to the canton.¹⁵¹ This working party was given the remit of drafting the cantonal government's statement on the framework license application and of supervising the granting of the various cantonal licenses necessary for the construction permit.¹⁵² The members of the working party appointed as mediator the chairman of the board of the Swiss Association of Accident Insurers (Schweizerische Unfallversicherungsanstalt), who also lives in the canton. Due to his political impartiality, his specialist knowledge in the field of radiation protection and his status of an outsider he was accepted by all parties.¹⁵³

Although the government of the canton retained ultimate political responsibility, the working party had a far-reaching advisory capacity and decided for itself which topics and which aspects of the disposal facility question it wanted to discuss. It decided to meet monthly and agreed that the meetings would not be public. At the close of each meeting the agenda for the following meeting was drawn up by the mediator and discussed and approved. The working party also agreed to speak with one voice when publishing its comments and results and undertook to maintain strict confidentiality.¹⁵⁴

¹⁵¹ That means that all members of the working group had a special connection with the affected canton (because they were born in that canton, worked in that canton, lived in that canton etc.). This special connection can help to create a feeling of solidarity among the participants during the mediation process.

¹⁵² Waelti, op cit note 51., at 291.

¹⁵³ Ibid.

¹⁵⁴ Ibid., at 292.

The working party reported to the Government of the canton at the beginning of 1995. The report recommended that the Government should approve the framework license application and grant the various cantonal licenses subject to certain conditions. In particular, the report recommended that cantonal residents have a say¹⁵⁵ in determining the contents¹⁵⁶ of the disposal facility. Furthermore, it called for a quality assurance plan to be drawn up and that the question of siting the disposal facility deeper in the ground be examined and a comparison made between the options submitted.¹⁵⁷

Although the representatives of opponents to the facility did not agree with the way the cantonal licenses should be granted,¹⁵⁸ the report of the Wellenberg working party presented a consensual opinion. However, the people of the affected canton made use of their political rights and legally required referendum. In June 1995 the vote about the situation of the nuclear disposal facility in their canton took place. In a close decision, 52 per cent of the electorate rejected both the opinion of the cantonal government and the granting of licenses.¹⁵⁹

Even though in the end the residents of the canton themselves decided against the proposed site in their canton the procedure lead for the first time to a joint statement¹⁶⁰ with regard to a nuclear disposal facility. On the other hand the procedure at central government level¹⁶¹ did end in a breakdown in talks and the report on reprocessing was even never formally approved within the conflict resolution group. In the next paragraph I therefore examine why the two procedures had such different outcomes.

C.3.5 *A comparison of the two procedures*

One reason for the different outcomes of the two procedures is that the mediation-like processes occurred at different stages. The procedure at central government level took place within the framework of the Energy

¹⁵⁵ In form of a legally required referendum.

¹⁵⁶ Size of the disposal facility, capacity of the disposal facility etc.

¹⁵⁷ Waelti, op cit note 51 at 292.

¹⁵⁸ The opponents thought that the license should be granted in stages, not all at once, and that initially only the licence for building an exploratory tunnel should be granted.

¹⁵⁹ Waelti, op cit note 51, at 293.

¹⁶⁰ The report of the Wellenberg Working Party presented for the first time a consensual opinion with regard to a nuclear disposal facility among the affected parties.

Peace¹⁶² and was intended to help create a consensus on energy policy. The primary functions of the discussion in the disposal conference, and then later in the conflict resolution groups, was to formulate policy, and as such they were initiated at far too late a stage.¹⁶³ This was also one important reason why many of the participants thought the discussions pointless. The mediation efforts at the proposed sites, on the other hand, were part of the process implementing nuclear waste disposal policy and began at a time when NAGRA was already gaining ground, but when all options were still, at least theoretically, open.¹⁶⁴

Another reason can be seen in the behaviour of the involved parties with regard to the agreed confidentiality. In both procedures it was decided that the disposal conference would be confidential. This agreement was kept by the parties in the Wellenberg process in which the working parties spoke with one voice when publishing its comments on results. In the other procedure there must have been a breach of trust among the participants after the central government granted permission for the expansion of a nuclear power station in the middle of the talks.

A further reason for the different outcomes of the two mediation procedures can be identified in the decentralised structure of the Swiss political system, which causes problems when siting decisions are taken at central government level. The unilateralism of central government with regard to the selection of the proposed site was therefore at odds with the socio-political nature of Swiss society. Most of all since the issue in contention is appropriate to influence the feeling of safety and security of the people.

One can say that nuclear waste disposal policy shows that the system deals more effectively with challenges, which are brought

¹⁶¹ See C.3.3.

¹⁶² Based on the decision of the Swiss electorate in 1990 to place a ten-year moratorium on construction of new power plants and on the energy clause in the Swiss Federal Constitution the "Energy 2000" plan of action was launched in early 1991. Apart from quantitative prescriptions concerning energy consumption, the plan of action forms the basis for an "energy peace", modelled on the Swiss "labour peace", which aims to bring the energy industry, environmental organisations, central government, cantons and local authorities together around the negotiating table. It calls for the use of conflict resolution groups in the problem areas of hydroelectric power, electrical transmission wires and nuclear waste disposal.

¹⁶³ Waelti, op cit note 51, at 295.

¹⁶⁴ Ibid.

vertically¹⁶⁵ than with those brought horizontally.¹⁶⁶ Whilst the vertical conflicts between national and local or cantonal authorities require decision-makers to make substantial concessions during the planning process, the horizontal conflicts in waste disposal policy mainly lead to blocks to the procedure, without the environmental organisations gaining any substantive concessions from them.¹⁶⁷ For instance, it proved possible to smooth out the differences between the federal government and the cantonal and local authorities by informally including the latter, whereas the conflicts between the federal authorities and the environmental organisations intensified. By manoeuvring the environmental organisations out of the process, they focused their energy on opposition campaigns and mobilising their local members. In the end one can say that the breakdown in talks paid dividends to the environmental organisations and the acceptance of the referendum strengthened their position.¹⁶⁸ Thus, the influence of the environmental organisations on the result of voting's with regard to energy policy and waste disposal has been underestimated by the federal authorities.

Both the procedure at federal level and at the potential site do possess, even if only to a small extent, new elements differing from the traditional extra-parliamentary and advisory committees in Switzerland. Still, the question if the Swiss political and administrative culture does not already have a wide variety of other mechanisms for conflict resolution which strongly qualifies the purpose and potential value of mediation procedures remains. This comment by Knoepfel¹⁶⁹ is probably true for areas of politics where a strong participatory structure is already in place such as for example in the aforementioned areas of nature conservation¹⁷⁰ and transport.¹⁷¹

Nevertheless, I agree with Waelti¹⁷² that the Swiss decision making system offers a good basis for mediation procedures in those areas of

¹⁶⁵ In vertical conflicts the authorities at all levels (federal, cantonal and local) participate whereas in horizontal conflicts only one authority participates.

¹⁶⁶ Waelti, *Problemlösungsstrategien in der nuklearen Entsorgung*, Dissertation (1994) University Press of Geneva (Switzerland) 103-105.

¹⁶⁷ Waelti, op cit note 51, at 295.

¹⁶⁸ Ibid.

¹⁶⁹ Knoepfel, op cit note 93, at 21.

¹⁷⁰ See C.2.3.

¹⁷¹ See C.2.4.

¹⁷² Waelti, op cit note 51, at 296.

politics where there is little participation. In particular the field of parastatal implementation contains a potential for mediations procedures, which should not be underestimated. One reason is that private corporations have the option of greater flexibility in dealing with them than the authorities, that are bound by clear legislation regulating implementation. The authorities are prohibited from making substantive concessions in order to break the impasses. To choose such a co-operative approach in form of mediation requires incentives. Such an incentive can be seen in the Swiss executive process¹⁷³, with its multiple opportunities for intervention and veto and the consequential loss of time and concomitant decrease in efficiency. But this would require round table talks to be organised on a more stable basis. Mediation procedures in which, the administration plays the role not of mediator but of one of the parties to the conflict, could help to bring about this kind of stabilisation. However, the mediation procedures would have to begin at an early stage; otherwise many of the participants will always fear that such processes are pointless because 'too little, too late'.¹⁷⁴

C.3.6 Recommendations and prospects for the future

Below, I analyse the two procedures I have described to determine the prerequisites of a successful environmental mediation and the prospects for establishing well managed processes in the future.

C.3.6.1 Preconditions for a successful procedure

- The subject of the negotiation is a conflict of interest, not a conflict of values

Probably the most important element necessary to reach a successful resolution is that the conflict is amenable to mediation. A balance of interests must be possible in an objective respect. Furthermore it is a determining factor that the object of conflict does not include basic (ethical) principles between the parties.¹⁷⁵ The parties involved in the mediation efforts at the proposed site knew that the question of

¹⁷³ The Swiss executive process means that the realisation of a federal, cantonal or local project (for example the canton decides to build a motorway) can take decades because of the numerous opportunities (legal and political) of the affected people to block the project.

¹⁷⁴ Waelti, op cit note 51, at 297.

¹⁷⁵ Neff, *Einsatzmöglichkeiten von alternativen Verfahrensmethoden und Konfliktmittlung bei der Realisierung von Grossprojekten*, in: URP 2001, at 382.

general energy policy represented a conflict of deep-seated values and as they were aware in advance that they were unlikely to reach consensus on this conflict and compromise would leave all sides dissatisfied they decided that the broad policy issues were left off the agenda.¹⁷⁶ The intention was to discuss a waste inventory and the form of the waste, plans for the disposal of nuclear waste and the safety of final disposal facilities, in order to separate these questions from the more value-driven energy policy, which includes the pursuit of nuclear energy production.¹⁷⁷ This approach was laudable but the failure to define the ground rules and aims of the procedure created an undercurrent of aggression during the disposal conference of 1991, and it soon became clear that the environmental organizations had agreed only with great reluctance to exclude the question of general energy policy from this conference.¹⁷⁸ Meanwhile the subject of the negotiation in the mediation procedure at the proposed site was obviously a conflict of interest since the existence of nuclear waste is just a matter of fact and cannot be denied by any of the parties. No one disputes the fact that there is a genuine need to dispose somehow the waste that had already been produced and would continue to be produced. All participants indicated a preference to store the nuclear waste of the Swiss nuclear power station in a safe place somewhere in Switzerland than to export it to other countries where the storage of the nuclear waste cannot be monitored at all.

- Will to mediate and participation is voluntary

In the mediation procedure at central government level the main parties to the conflict were evidently not ready to compromise. As already mentioned, both representatives of the operators voiced the opinion that they had had no hopes of gaining anything from the procedure. The environmental organizations were also very skeptical. And the central government did not make a great effort to compromise, otherwise it would not have approved an increase in

¹⁷⁶ Dealing with the manageable and deferring or agreeing not to deal with the deep intractable problems is a well know strategy for management of conflict. This way of managing mediation processes leads often to deadlock of the process.

¹⁷⁷ Waelti, op cit note 51, at 285.

output from a already existing nuclear power station in the middle of the procedure (December 1992).¹⁷⁹ Furthermore participation was not entirely voluntary. The operators felt obliged to take part because they did not want to upset the environmentalists and the authority seemed, at least in the beginning, to have difficulty finding anyone motivated to take part.¹⁸⁰ In the mediation procedure at the proposed site, on the other hand, there existed a clear will to reach a compromise. This will to compromise led to a consensual opinion of the working party in its report. All the members of the working party agreed with the conditions laid down in the report. Participation was in this procedure entirely voluntary and the fact that all the members of the group were in at least indirect relationship to the canton seemed to have a positive effect on the commitment of the parties to the process.

- The mediator is impartial and credible for all

This condition was met but both of the mediators were not trained in mediation. The mediation process may have been more successful if the mediator had been trained to draw out the important issues in the conflict. Skilled mediators would have also had more flexibility in identifying or creating scope for negotiation.¹⁸¹

- There is a willingness on all sides to respect the agreed rules

In the mediation procedure at the proposed site the working party had set clear rules for its monthly meetings, including to draw up, discuss and approve the agenda for the following meeting. Furthermore it had set itself the goal of reaching decisions and drafting reports in the course of a consensual process.¹⁸² In contrast, in the mediation procedure at the central government level there were hardly any agreed rules. It seems that it was rather a loose facilitation than a structured engagement managed by the mediator. Nevertheless, the

¹⁷⁸ Ibid.

¹⁷⁹ Cavigelli, op cit note 69, at 302 and Waelti, op cit note 51, at 287.

¹⁸⁰ Cavigelli, op cit note 69, at 310.

¹⁸¹ Ibid., at 311.

¹⁸² Waelti, op cit note 51, at 292.

behaviour of the participants was considered by most people to be appropriate.¹⁸³

- Confidentiality of the process

A successful mediation depends also on the fact that information in connection with the mediation process is confidential and not accessible to others without consent of the parties. Without the sure knowledge that everything said during the hearing or during a "caucus" will remain private, mediation would not work because the parties would not feel free to explore honestly all aspects of their dispute and possible avenues to settlement. But sometimes it is possible that so-called data conflicts block a mediation process. The most common data problems are lack of information, misinformation, and discrepancies in data the parties believe are relevant to deciding the issues. In such situations mediators have to find a way to generate movement by encouraging information sharing among the parties. However, there is no duty of the mediator greater than the duty to preserve the confidentiality of everything revealed to him during the hearing or during a caucus. Such an information sharing with help of the mediator is therefore only possible with permission of the affected parties.¹⁸⁴

In the mediation procedures at the proposed site and at the central government level the confidentiality of the processes was granted.¹⁸⁵

- There is sufficient negotiating power

An environmental mediation can only be successful if the participants have the power to negotiate. This means that the parties must have more or less the same potential of threat and the same potential of change. If the conflict involves a substantial imbalance of power, mediation is probably not the right way to solve the dispute. Furthermore the procedure of mediation is not suitable for conflicts, which involve a large number of parties.¹⁸⁶ In both of the procedures there was, at least with regard to political power, no obvious imbalance

¹⁸³ Cavigelli, op cit note 69, at 311.

¹⁸⁴ Lovenheim, *Mediate, Don't Litigate* (1989) McGraw-Hill Publishing Company (USA) 44.

¹⁸⁵ Waelti, op cit note 51, at 285 and 292.

¹⁸⁶ Fiss 'Against Settlement' 93 *The Yale Law Journal* (1984) 1078 et seq..

of power. Both the environmental organisations and the operators possess political power. The political power of the environmental organisations lies for example in the mobilisation of membership, in organising blockades and in press and electoral campaigns. However, the political weight of the operators is greater. That has to do with their influential links to political and administrative institutions, which can to some extent be attributed to existing power structures. For example, several members of the federal and cantonal governments are on the board of directors of the Association of the Swiss power stations.¹⁸⁷ However, as we saw in the mediation procedure at the proposed site, the operators should never estimate the political power of the environmental organisations to influence the outcome of a voting since nuclear energy policy and the question of disposal of nuclear waste remain two of the most controversial issues in Switzerland.

C.3.6.2 Prospects for the Future

Even though one mediation procedure soon ended in a breakdown in talks and the promising result of the other was rejected in a referendum, one can say that these procedures probably ended in a kind of restart with regard to environmental mediation in Switzerland, and created the necessary conditions for the start of a new round of talks, in which energy policy and the question of waste disposal could be discussed together.¹⁸⁸

One of the most important things with regard to future mediation procedures in the field of nuclear waste disposal or energy policy in general is that such a procedure would have to begin at an early stage and not when one participant has already, even if unofficially, come to a decision.¹⁸⁹

However, another important feature of future procedures is that they are facilitated by an experienced and well-trained mediator, who has the necessary mediation skills to guide the discussion towards the decisive points. Furthermore, the mediator and the participants also have to place

¹⁸⁷ Cavigelli, op cit note 69, at 310.

¹⁸⁸ Waelti, op cit note 51, at 287.

¹⁸⁹ Ibid., at 297.

far greater emphasis on a clear definition of the aims and the ground-rules for the procedure in advance.

Finally, it would be important to prevent the repetition of the same mistakes. Unfortunately the involved parties missed the opportunity to debrief and reflect honestly on what went wrong and what went right during the two procedures. An evaluative research project accompanying the procedure could help to avoid the same mistakes and could also clarify the limitations and potential of new conflict management procedures of this kind.¹⁹⁰

The question how these consensus-seeking procedures can survive if the opportunity for referendum can act as a veto remains. Nevertheless, in my opinion a successful mediation procedure in which all affected and influential parties are involved can avoid a referendum or, at least, influence the outcome of a referendum.

In the end all of the involved parties should bear in mind that the need for the safe disposal of radioactive is not disputed by anyone. Thus, the highly controversial discussion between authorities, environmental organizations and operators about the general energy policy in Switzerland needs to be resolved in order to avoid the permanent risk of an incident in connection with the already produced nuclear waste, stored at the moment in interim storage somewhere in Switzerland.

D The Use of mediation to resolve environmental disputes in South Africa

D.1 Environmental Mediation in South Africa

On the African continent it is South Africa, which has experienced the most extensive development and use of formal mediation process.¹⁹¹ In 1968, the Centre for Intergroup Studies¹⁹² was founded to create cooperative, creative and constructive approaches to resolving conflicts.¹⁹³ By the late 1970's the statutory dispute resolution mechanism in South Africa were largely discredited as ineffective apartheid institutions, and

¹⁹⁰ Cavigelli, op cit note 69, at 313.

¹⁹¹ Moore, op cit note 47, at 39.

¹⁹² Now the Centre for Conflict resolution.

¹⁹³ Moore, op cit note 47, at 39.

employers and employees came together to establish a private dispute resolution body to mediate and arbitrate labour disputes.¹⁹⁴ The Independent Mediation Service of South Africa (IMSSA) was finally established in 1984.¹⁹⁵ IMSSA trained mediators and arbitrators and made their services available to employers and employees.¹⁹⁶

The success of mediation in the area of labour conflict led to an expansion into the spheres of racial and political conflict. In respect of the dramatic changes following the release of Nelson Mandela in 1990, mediation became not only acceptable, but indeed quite popular and has moved beyond the labour field.¹⁹⁷ Since then mediation has been used by many organizations¹⁹⁸, international agencies, the state and political parties (in particular the African National Congress and the Inkatha Party) to resolve disputes, especially political conflicts.

Through the National Peace Accord (NPA), activate during the period from 1991 until 1994, mediation was introduced at grassroots level to solve inter- and intra-community conflicts. Alongside the NPA's official process, a mediation industry developed in South Africa, bringing along national and international practitioners, training packages and people to be trained and re-trained in the art of mediating conflict.¹⁹⁹

However, until 1998 there was no established tradition of environmental mediation discernible in South Africa. Environmental mediation as a dispute resolution process was at that time not really in use in South Africa, even though some disputes were already successfully mediated (for example the "Saldanha Steel"²⁰⁰ dispute was resolved by negotiation).²⁰¹

¹⁹⁴ Steadman, *The experience of workplace mediation in South Africa-lessons for the UK?*, www.cedr.co.uk/index.php?location=/library/articles/workplace_mediation_in_SA.htm (accessed on 11 July 2005). In the 80s the political organisations of black people were banned and labour conflict was a proxy for political protest so the battle for freedom from apartheid was played out in violent strikes in the public and private sectors of economy.

¹⁹⁵ Nina, *Beyond Mediation: How South Africa's 'Other Mediation is Challenging Conventional Models*, www.trinstitute.org/ojpcr/tracktwo4.htm (accessed on 11 July 2005).

¹⁹⁶ Steadman, op cit note 194.

¹⁹⁷ Odendaal, *Modelling Mediation: Evolving Approaches to Mediation in South Africa*, www.trinstitute.org/ojpcr/1_3tt2.htm (accessed on 11 July 2005).

¹⁹⁸ The most notable were the African Centre for the Constructive Resolution of Disputes (ACCORD), Vuleka Trust, Wilgespruit Fellowship, the Negotiation Skills Project (Fund Centre), the Institute for a Democratic Alternative in South Africa (IDASA), and a number of dispute resolution programs at the University of Port Elizabeth and the University of Witwaterstrand; see Moore, op cit note 47, at 39.

¹⁹⁹ Nina, op cit note 195.

²⁰⁰ In 1994 a proposal was put forward for the erection of a steel plant at Saldanha, a periurban coastal town 120km north-west of Cape Town. The decision to build the steel plant at Saldanha

At the end of the 1990s, the only statute in South Africa with general environmental dispute resolution implications was the Environment Conservation Act 79 of 1989. This Act, within the context of the Constitution, which was adopted in 1996 and entered into force 3 February 1997, formed the framework within which environmental dispute resolution operated in South Africa.²⁰² The aim of this Act is, inter alia, to enable the Minister to manage environmental affairs as well as possible and a considerable emphasis is placed on centralised, top-down decision-making and management in which the executive plays the most important role. The Act aims to provide the Minister with quality information so that he is able to make well-informed decisions on how to manage environmental problems.²⁰³

However, this kind of executive management is not a dispute resolution process in the strict sense because the parties in conflict have no control over either the process or the result.²⁰⁴ Section 15 of the Environment Conservation Act 73 of 1989 also envisages a so-called Board of Investigation. According to that provision the Minister of Environmental Affairs and Tourism may appoint an ad hoc Board of Investigation when the need arises. However, the Environment Conservation Act expressly states that the Board is merely to assist the Minister in the evaluation of any matter or appeal.²⁰⁵ Thus, the Board has no legal decision-making power and cannot properly be regarded as a dispute resolution method in the strict sense.²⁰⁶ To sum up one can say that until recently, litigation has been the traditional method of resolving environmental disputes.

The final 1996 Constitution of the Republic of South Africa (Act No 108 of 1996) and in particular the fundamental environmental rights

sparked an intense and protracted conflict between environmental groups, the developers, and the local community. The conflict was portrayed as a clash of interests between those concerned about the natural environment in the Saldanha area, those who wanted to uplift the Saldanha community by offering jobs, and the local community, which stood to benefit economically from employment opportunities and economic spin-offs from the plant. Economic development of the Saldanha area to improve the quality of life of its community was never in dispute; see The Saldanha Bay Conflict <http://ccrweb.ccr.uct.ac.za/archive/two/4/p7.html> (accessed on 15 July 2005)

²⁰¹ Van den Berg 'Environment dispute resolution in South Africa-towards sustainable development' 81 *South African Journal of Environmental Law and Policy* 5 (1998) 81.

²⁰² *Ibid.*, at 76.

²⁰³ *Ibid.*, at 77.

²⁰⁴ *Ibid.*

²⁰⁵ Section 15(1).

granted by s 24 read with s 38 of the Bill of Rights are set to lead to an increase in constitutional litigation about environmental disputes. However, in environmental disputes litigation is seldom the optimal resolution of conflict since litigation is always expansive and slow, generally destructive of the relationship between the parties and ends normally in win-lose situations for the parties.²⁰⁷ Until the end of 1998 environmental mediation in South Africa was neither encouraged nor forbidden by any statutory instruments.

Knowing that mediation holds particular potential in environmental disputes where typically a disparate number of parties have a varied and divergent interest in a particular issue²⁰⁸ it became obvious that facilitation and encouragement of environmental mediation as a process was what was needed from the legislature at that time.²⁰⁹ The legislature realized a need for alternative dispute resolution to resolve environmental disputes in South Africa. It therefore took this method of dispute resolution into account when it decided to supersede the Environment Conservation Act 73 of 1989 by the National Environmental Management Act 107 of 1998 which repeals some but not all of the provisions of the Environment Conservation Act.²¹⁰ In the following paragraphs I examine the impact of the National Environmental Management Act on environmental mediation in South Africa.

D.2 National Environmental Management Act (NEMA)

D.2.1 The History of NEMA

The National Environmental Management Act 107 of 1998 is regarded as a milestone statute in environmental affairs in South Africa. Not only was pioneering work done with regard to the democratic and negotiated policy and legislative processes that preceded it, but NEMA is also the first umbrella national legislation which endeavours to establish an integrated environment management framework which will transform and co-

²⁰⁶ Van den Berg, op cit note 201, at 80.

²⁰⁷ Ibid., at 78 et sqq..

²⁰⁸ Glazewski, *Environmental Law in South Africa* (2nd ed.) (2005) LexisNexis Butterworths (South Africa).

²⁰⁹ Van den Berg, op cit note 201, at 84.

²¹⁰ Glazewski, op cit note 208, at 133.

ordinate most of the currently diverse and fragmented sectors of the environment.²¹¹

NEMA's origins can be found in the environmental policy development process. This process is known as the Consultative National Environmental Policy Process (CONNEPP) and was launched in August 1995 at a national conference in which about 500 representatives took part. Less than a year later, in April 1996, a discussion document was released and six months later the Green Paper on an Environmental Policy for South Africa was released.²¹² Between late October 1996 and 16 December 1996 the general public was given the opportunity to comment on these documents. In January 1997 a second conference was held and on 28 July 1997 a draft White Paper on Environmental Management Policy for South Africa was published. Comments were invited from the general public to be submitted before end of August 1997.²¹³ The final White Paper on Environmental Management Policy for South Africa was released on 15 May 1998. This White Paper, which was the outcome of an extensive public participation process, laid the foundation for NEMA.²¹⁴

The draft National Environmental Management Bill was finally published on 1 July 1998, calling for comment by 28 July of the same month. The very next day on 29 July 1998 the Cabinet approved the Bill. It was passed in the National Assembly on 21 September and, while it was being debated in parliament several public hearings were being held. These were hosted by provincial environmental portfolio committees to prepare representations for the National Council of Province's (NCOP)²¹⁵ consideration of the Bill. While noting a few minor amendments, the NCOP approved the Bill shortly afterwards.²¹⁶ The National Environmental Management Act 107 of 1998, was finally passed by the National Assembly on 5 November 1998, and came into force in January 1999.²¹⁷

²¹¹ Bray 'Co-operative governance in the context of the national environmental management Act 108 of 1998' *South African Journal of Environmental Law and Policy* 6 (1999) 1.

²¹² Kidd 'The National Environmental Management Act and public participation' *South African Journal of Environmental Law and Policy* 6 (1999) 24.

²¹³ Ibid.

²¹⁴ Glazewski, op cit note 208, at 134.

²¹⁵ The NCOP is indirectly elected by the provincial legislatures with limited veto power over legislation (S 68 of the Constitution).

²¹⁶ Kidd, op cit note 212, at 24.

²¹⁷ Glazewski, op cit note 208, at 137.

D.2.2 NEMA and its scope

The Constitution of the Republic of South Africa (Act No 108 of 1996) contains the right to the environment as a fundamental right. This means that the executive acts of government and national legislation must consistent with this right. The Constitution provides that everyone has a fundamental right to an environment that is not harmful to health or well-being and that government must by legislative and other measures protect the environment by preventing pollution, promoting conservation and sustainable development, while building the economy and society.²¹⁸

Apart from the Constitution there exist many other laws, which protect the environment, for example, nature conservation laws, water laws, air pollution laws and the recently enacted NEMA. NEMA is designed to enhance protection of environmental rights. It does so by creating a number of environmental principles to guide government action.²¹⁹

However, as NEMA entered into force on 29 January 1999 it can only be used for problems that are about to happen or that happened after 29 January 1999. It does not help to solve problems, which started before this date unless the problem is continuing.²²⁰

The National Environmental Management Act is made up of 10 Chapters. A discussion of the effect of NEMA on the environmental law in South Africa is far beyond the ambit of this article, and the focus of this paper will be on Chapter 4 since it provides a basis for alternative dispute resolution procedures, particularly mediation procedures which are necessary in environmental conflict.²²¹

D.2.3 Chapter 4 NEMA: Alternative Dispute Resolution

The dispute resolution provisions in the NEMA are set out in Chapter 4: *Fair Decision-Making and Conflict Management*. It, refers to four different dispute resolution procedures: facilitation, mediation/conciliation, arbitration and investigation. Although Chapter 4 refers to all four aforementioned procedures, it is focused on mediation.²²²

²¹⁸ www.environment.gov.za/soer/nsoer/resource/nema/a%20user%20guide%20to%20nema.html (accessed on 15 May 2005).

²¹⁹ Ibid.

²²⁰ Ibid., at 4.

²²¹ Glazewski, op cit note 208, at 137; Barbour, *National Environmental Management Act No. 107 of 1998 A Brief Introduction*, Development Facilitation Training for IMSSA Mediators (1999), at 80.

²²² Glazewski, op cit note 208, at 127.

The relevant provisions can broadly be divided into two types of measures: Those which attempt to resolve environmental conflicts between different tiers of government, and those that provide for a form of dispute resolution mechanism between private parties and government.²²³

D.2.3.1 The relevant provisions

Section 17 provides as follows:

Reference to conciliation

- (1) Any Minister, MEC²²⁴ or Municipal Council-
 - (a) where a difference or disagreement arises concerning the exercise of any of its functions which may significantly affect the environment, or
 - (b) before whom an appeal arising from a difference or disagreement regarding the protection of the environment is brought under any Law,may, before reaching a decision, consider the desirability of first referring the matter to conciliation and-
 - (i) must if he, she or it considers conciliation appropriate either
 - (aa) refer the matter to the Director-General for conciliation under this Act; or
 - (bb) appoint a conciliator on the conditions, including time-limits, that he, she or it may determine; or
 - (cc) where a conciliation or mediation process is provided for under any other relevant law administered by such Minister, MEC or Municipal Council, refer to the matter for mediation or conciliation under such other law; or
 - (ii) if he, she or it considers conciliation inappropriate or if conciliation has failed, make a decision: Provided that the provisions of section 4 of the Development Facilitation Act, 1995 (Act 67 of 1995), shall prevail in respect of decisions in terms of that Act and laws contemplated in subsection 1(c) thereof.
- (2) Anyone may request the Minister, a MEC or Municipal Council to appoint a facilitator to call and conduct meetings of interested and affected parties with the purpose of reaching agreement to refer a difference or disagreement to conciliation in terms of this Act, and the Minister, MEC or Municipal Council may, subject to section 22, appoint a facilitator and determine the manner in which the facilitator must carry out his or her tasks, including time limits.
- (3) A court or tribunal hearing a dispute regarding the protection of the environment may order the parties to submit the dispute to a conciliator appointed by the Director-General in terms of this Act and suspend the proceedings pending the outcome of the conciliation.

²²³ Ibid.

²²⁴ MEC means the Member of the Executive Council to whom the Premier has assigned the performance in the province of the functions entrusted to a MEC by or under such a provision.

Section 17 (1)(a) of NEMA provides for the resolution of inter-governmental conflicts by empowering any Minister, MEC or municipal council to refer to conciliation a dispute or disagreement concerning any of its functions which may significantly affect the environment. The statute does not designate a specific conciliator because the referrer can in terms of s 17 (1)(b) refer the dispute to the Director-General, a conciliator or, where the mediation is subject to another law, to the mediator or conciliator provided in such other law.²²⁵ A similar provision regulates the resolution of conflicts between government and private parties (see s 17 (2)). Under this subsection anyone may request the Minister, a MEC, or municipal council to appoint a facilitator to call and conduct meetings of interested and affected parties with the aim of reaching agreement to refer a difference or disagreement to conciliation.²²⁶ As Glazewski points out, s 17(2) does not stipulate what matters can be referred to this procedure; it does not in particular refer to differences or disagreements arising out of the application of this or other particular acts, so one can assume that any kind of disputes can be brought under this section's umbrella.²²⁷ Finally subsection (3) of section 17 provides that disputes regarding the protection of the environment before a court or tribunal may be referred to a conciliator appointed by the Director-General in terms of this Act.²²⁸

Section 18 details the manner of conciliation and procedures for conciliation. It provides for the appointment of a mediator, as well as the kind in which the mediator should resolve the environmental dispute.²²⁹ The wording of section 18 is the following:

Conciliation

- (1) Where a matter has been referred to conciliation in terms of this Act, the Director-General may, on the conditions, including time-limits, that he or she may determine, appoint a conciliator acceptable to the parties to assist in resolving a difference or disagreement: Provided that if the parties to the difference or disagreement do not reach agreement on the person to be appointed, the Director-General may appoint a person who has adequate experience in or knowledge of conciliation of environmental disputes.

²²⁵ Glazewski, op cit note 208, at 127.

²²⁶ Ibid.

²²⁷ Ibid., at 128.

²²⁸ Ibid.

²²⁹ Ibid.

- (2) A conciliator appointed in terms of this Act must attempt to resolve the matter-
 - (a) by obtaining such information whether documentary or oral as is relevant to the resolution of the difference or disagreement;
 - (b) by mediating the difference or disagreement;
 - (c) by making recommendations to the parties to the difference or disagreement; or
 - (d) in any other manner that he or she considers appropriate.
- (3) In carrying out his or her functions, a conciliator appointed in terms of this Act must take into account the principles contained in section 2.
- (4) A conciliator may keep or cause to be kept, whether in writing or by mechanical or electronic means, a permanent record of all or part of the proceedings relating to the conciliation of a matter.
- (5) Where such record has been kept, any member of the public may obtain a readable copy of the record upon payment of a fee as approved by Treasury.
- (6) Where conciliation does not resolve the matter, a conciliator may enquire of the parties whether they wish to refer the matter to arbitration and may with their concurrence endeavour to draft terms of reference for such arbitration.
- (7)
 - (a) The conciliator must submit a report to the Director-General, the parties and the person who referred the matter for conciliation, setting out the result of his or her conciliation, and indicating whether or not an agreement has been reached.
 - (b) In the event of no agreement having been reached, the report may contain his or her recommendations and reasons therefore.
 - (c) Where relevant, the report must contain the conciliator's comments on the conduct of the parties.
 - (d) The report and any agreement reached as a result of the conciliation must be available for inspection by the public and any member of the public may obtain a copy thereof upon payment of a fee as approved by Treasury.
- (8) The Director-General may from time to time with the concurrence of the Minister of Finance, appoint persons or organizations with relevant knowledge or expertise to provide conciliation and mediation services.

Chapter 4 also contains provisions for arbitration²³⁰ and for directing a more detailed investigation.²³¹ Arbitration is governed by the Arbitration Act²³² and in terms of the Commissions Act²³³ the Minister can confer the

²³⁰ Section 19.

²³¹ Section 20.

²³² Arbitration Act No. 42 of 1965.

²³³ Commissions Act No. 8 of 1947.

powers of a Commission of Inquiry on a person or persons into order to undertake a more detailed investigation.²³⁴

D.2.3.2 Chapter 4: Nice theory or relevant practice?

I was impressed when I read Chapter 4 for the first time. It is quite remarkable, with regard to my Swiss background where environmental mediation is not implemented in the legislation, how the South African legislator recognised that mediation and other forms of alternative dispute resolution could be an efficient way to resolve environmental disputes. It is worth noting that any Minister, MEC or Municipal Council may refer an environmental matter to mediation and a court or tribunal hearing an environmental dispute may suspend the proceedings and order the parties to attempt to settle by way of mediation. These procedures could definitely result in a decrease of (environmental) litigation and lead to an increase of environmental mediation. Furthermore the legislation provides that anyone, including the affected parties, may request the aforementioned representatives to appoint a facilitator with the purpose of reaching agreement to refer a difference or disagreement to conciliation in terms of this Act.²³⁵

It is obvious that the legislator intended to promote mediation and the other forms of alternative dispute resolution to resolve environmental disputes in South Africa. The legislator made also a significant contribution to environmental dispute resolution by authorising the funding of environmental mediators in appropriate cases. So it is indisputable that it was one of the main focuses of the legislator to promote alternative dispute resolution, and in particular mediation, to resolve environmental disputes in South Africa.

It was therefore a great disappointment when I found out during my research, after approaching the Department of Environmental Affairs and Tourism (DEAT) for information about the implementation of Chapter 4, that the national office of DEAT has not yet processed one successful case using any of the alternative dispute mechanisms provided for in Chapter 4. According to its Email the DEAT stated the following: "*The*

²³⁴ Barbour, op cit note 221, at 81.

²³⁵ Section 17(2).

*national office of DEAT has not yet processed a case using alternative dispute mechanism as mentioned in Chapter 4. We are still working on an implementation plan for this chapter and will then hopefully proceed with some implementation plan for this chapter and proceed with some test cases. Therefore, we do not as yet have any reports²³⁶ as stated in section 18 (7)(d) NEMA.*²³⁷ So the question arises if, almost 7 years after NEMA entered into force, Chapter 4 NEMA is nothing more than waste-paper or pretty paper.

One reason for this situation could be the process behind the enactment of NEMA. The analysis of this process reveals that there was a two and a half year period during which national policy was being developed which included at least three occasions when the general public were invited to submit comments on draft or discussion documents.²³⁸ From then on everything moved very quickly, perhaps too quickly. The publication of the draft NEMA Bill came barely one month after the publication of the final policy document. The public was then given just over three weeks to make comment on this draft. It is difficult to understand why, in contrast to the public involvement in the policy development process, the public was given such a short time to make comments on the draft.²³⁹ It is obvious that scrutinising proposed legislation is far more difficult than perusing policy documents. The commentators do not give any explanation for the rush to the end of the procedure. In my opinion one explanation could be that those in control of the process were determined to have the Act passed without delay since the Constitution and its environmental provisions were already in force. Maybe they feared that a delay would increase the uncertainty among the population with regard to the fundamental environmental rights granted by s 24 of the Constitution.

Then, to make matters worse, the NCOP, which considered making substantive submissions on the Bill, was persuaded not to amend the draft

²³⁶ During my research I had problems to collect information on cases where mediation has been used to resolve environmental disputes in South Africa. Therefore, I contacted the DEAT and asked them if they could support me with reports on mediation processes as stipulated in 18(7)(d). Section 18(7)(d) stipulates that the report and any agreement reached as a result of the conciliation must be available for inspection by public and any member of the public may obtain a copy thereof upon payment of a fee as approved by treasury.

²³⁷ According to an Email from the National Offices of DEAT 14 July 2005.

²³⁸ Kidd, op cit note 212, at 24.

because these amendments would result in a delay of at least six months before the Act was passed.²⁴⁰ It is understandable that one admires the wish to have such an important Act coming into effect as soon as possible but not at any price. One can only guess whether a longer time to make submissions would have changed something with regard to the implementation of Chapter 4. However, in the next paragraphs I show on the basis of two cases how mediation has been used recently in South Africa to resolve environmental disputes.

D.3 Processes in South Africa which involve environmental mediation

Although the DEAT national office is still working on the implementation of Chapter 4 NEMA, mediation as a generic process has in general already been used several times in South Africa to resolve environmental conflicts. In this chapter I examine two cases in which environmental mediation was involved to resolve the conflict. This examination will involve a case of conflict over industrial effluent disposal and of conflict over the establishment of abalone farm on Pringle Cove smallholding, Pringle Bay.²⁴¹

D.3.1 Environmental mediation in the context of industrial effluent disposal

D.3.1.1 The origin of the dispute

The marine environment of the South Coast of KwaZulu-Natal has been a recreational and tourist destination for a long time. Holiday makers, divers and fishers have been attracted by the beaches and lagoons of this area.²⁴²

Situated at the upper South Coast of KwaZulu-Natal are three large companies (AE & CI Ltd, Sappi Saiccor²⁴³ and Tioxide SA) which together employ around 4000 employees. All three companies discharge industrial effluent into the sea via pipelines on the basis of a permit granted by the

²³⁹ Ibid.

²⁴⁰ Ibid., at 25.

²⁴¹ The case on the proposed abalone farm has been processed under Chapter 4 NEMA. It is thus incomprehensible that the national office of DEAT wrote in its email (14 July 2004) that it had not yet processed a case using alternative dispute mechanism as stipulated in Chapter 4.

²⁴² Rycroft, Scott & Robertson 'Environmental Mediation: A case study on conflict over marine resources' *South African Journal of Environmental Law and Policy* 5 (1998) 88.

²⁴³ A division of Sappi Ltd one of the top 20 pulp and paper manufacturers in the world.

Department of Water Affairs and Tourism.²⁴⁴ The impact of the discharge of the effluent from the pipelines has been the cause of great controversy since the 1960s. The presence of foam, discolouration and toxicity have caused concern and anger within the local community and the sea users and resulted in campaigns, such as a bumper-sticker campaign targeting Sappi Saiccor.²⁴⁵

Heightened tensions and threats of litigation led to the establishment of the South Coast Marine Pipeline Forum (SCMPF) in August 1995. The group was made up of a range of stakeholders, which committed themselves to the joint resolution of the conflict. Furthermore, the pending renewal of the Sappi Saiccor permit to discharge industrial effluent into the sea in October 1996 provided a strategic moment for the establishment of this forum.²⁴⁶

D.3.1.2 The process: Stakeholder Workshops

The first steps in the SCMPF process were to identify the stakeholders and to organise separate stakeholder workshops in order to encourage participation in and commitment to the process. The following eight stakeholder groups were finally decided upon by the SCMPF: the tourist trade, conservation, government authorities, sea-users, sea-based business, the communities at Amanzimtoti and Umkomaas, the three companies, and employees of the three companies.²⁴⁷ In a next step the representatives of these stakeholder groups were contacted and invited to attend the separate workshops.

The SCMPF requested the Independent Mediation Services of South Africa to appoint facilitators for the eight stakeholder workshops. The facilitators designed a format for the workshop to identify the interests and concerns of the different stakeholders.²⁴⁸

The purpose of the next step was to ensure the understanding for the other groups' perspectives and to remind the group that the situation involved competing interests that required balancing. Therefore the

²⁴⁴ Fisher 'Land sourced pollution of the marine environment' 12 (1995) *Environmental & Planning Law Journal* 116.

²⁴⁵ Rycroft, Scott & Robertson, op cit note 242, at 88.

²⁴⁶ Ibid.

²⁴⁷ Ibid., at 90.

²⁴⁸ Ibid., at 91.

groups were asked to speculate what the interests and concerns of the other seven stakeholder groups might be.²⁴⁹

Thereafter the groups were asked to brainstorm any possible solutions. The results of this brainstorming were written on flipcharts. The aim of this step was to allow the groups to see that there exists a wide range of solutions, everything from closure of the companies to unregulated pollution.²⁵⁰

The last step during these stakeholder workshops was to ask the groups to decide what criteria should be used to evaluate the list of solutions. The aim of this step was to narrow the range of solution options to those perceived by the groups as meeting broad policy aims.

Finally, two to three representatives from each stakeholder group were elected to take the concerns of the group forward to the final stakeholder workshop where the representatives of the eight stakeholder groups' were to meet together.²⁵¹ Each of the representatives who were to attend the final multi-stakeholder workshops received a full report on the outcome of all the stakeholder workshops.

D.3.1.3 The process: The Final Workshop

The multi-stakeholder final workshop was held over a full afternoon and the following morning. The representatives from all stakeholder groups, who had the opportunity to read through the reports of each others' workshops, were asked simply, in a first step, to list their main concerns which they felt needed to be addressed.²⁵² Thereafter a draft was prepared by the facilitator of what concerns any chosen solution had to recognise and the representatives were requested to rework this draft to their satisfaction. Through this procedure an agreed text was facilitated which read:²⁵³

"It is agreed by all stakeholders to find a solution which recognises:

- a. the economic and employment interests of stakeholders;*
- b. the need for a sustainable marine, coastal and estuarine environment;*
- c. the need for transparency, participation and information;*

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid., at 92.

²⁵² Ibid., at 92-93.

²⁵³ Ibid., at 93.

- d. the need for a timeous solution;*
- e. the demonstration of on-going, objective and effective management of the environment through regulation and enforcement;*
- f. commitment to constructive relationships.”*

This charter of objectives was broad and the next part of the procedure was an attempt to test the representatives' commitment to it and to get them to make it concrete in terms of specific action plans. For this reason the representatives were divided into three groups reflecting a mixture of the different stakeholders.²⁵⁴ The following task was set:²⁵⁵

"Referring to the agreed objectives,

- 1. List the main (+- 5) consequences if the companies' permits were refused;*
- 2. List the main (+- 5) consequences if the companies' permits were granted subject to existing conditions (i.e. the status quo);*
- 3. If the companies' permit applications were supported by agreed action plans to address the problems, specify what these plans would be.”*

When asked to select one of these three scenarios as the most desirable, all three groups selected Scenario 3. In other words, the representatives agreed that regulation of pollution was the appropriate mechanism to meet the agreed charter of objectives. Even though the action plans were creative and varied, it was agreed that the SCMPF request the Minister to establish a Permit Advisory Panel (PAP) to allow for public participation in the permitting process.²⁵⁶ The remit of the PAP would be to make recommendations in respect of the conditions pertaining to permits, in order to ensure continual improvement of marine effluent. The workshop was unable in the time at its disposal to delve into technical specifications and so expressed these only in vague terms.²⁵⁷

A drafting sub-committee was established at the workshop. Its remit was to synthesise the overlapping action plans proposed by the three working groups and to produce a consolidated report for consideration by the next meeting of the Pipeline Forum. This consolidated

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Such as the need to achieve within 5 years internationally acceptable sea water quality, modified by agreement to local conditions. Ideas such as punitive production cutbacks for transgressions,

report was submitted to the Minister early enough to be considered in the procedure of the renewal of Sappi Saiccor's permit to discharge effluent into the sea.²⁵⁸

The report proposed firstly that the guiding principles agreed upon by all stakeholders be accepted as a framework for determining the solutions to marine pollution. Secondly, it was proposed that the existing permits issued to the 3 companies were unacceptable, and that only a short-term interim permit should be granted to Sappi Saiccor and that it should be subject to specific conditions to improve effluent quality and lead to some relief in the short term. It was also agreed that a mechanism needs to be put in place to achieve a long term-sustainable solution.²⁵⁹ The mechanism proposed to achieve this long term improvement in effluent quality is the PAP. The stakeholders envisaged that the objective of the PAP would be the continual improvement of effluent; it would monitor effluent quality; it would review from time to time the permit conditions and compliance and the performance of the industries. The co-ordination and facilitation of the PAP would be in the hands of the companies.²⁶⁰ The PAP would devise a mechanism for public participation and as such would be a transparent mechanism of decision-making and permit management.²⁶¹

D.3.1.4 The outcome

The Minister of Water Affairs finally granted Sappi Saiccor the renewal of their permit in November 1996. The permit was subject to a number of conditions. One was that an Environmental Impact Assessment be undertaken of the measures proposed by Sappi Saiccor for reducing marine pollution. A further condition was that all the industries with permits to discharge marine effluent set up PAPs.²⁶²

credit for good performance, and restitution to small businesses, were suggested; see *Ibid.*, at 94.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Because of the proximity of the pipelines, AE & CI Ltd. and Tioxide SA have decided to establish one Permit Advisory Panel to deal with the recommendations for both pipelines while Sappi Saiccor had its own PAP.

²⁶¹ Rycroft, Scott & Robertson, *op cit* note 242, at 93.

²⁶² At the time this article was written, only the inaugural meetings of the AE & CI Ltd and Tioxide SA (on 5 February 1997) and the inaugural meeting of the Sappi Saiccor Permit Advisory Panel (in April 1997) were held.

In an attempt to find out if these Permit Advisory Panels still exist, I wrote to a member of both the Sappi Saiccor and the AECI and Tioxide SA Permit Advisory Panel.²⁶³ In her answer from 21 July 2005²⁶⁴ she stated that the Sappi Saiccor Permit Advisory Panel is continuing but that the affected community (Umkomaas) is now in the eThekweni Municipality governed by different municipal regulations. The AE & CI and Tioxide SA Permit Advisory Panel, on the other hand, has dissolved. The current system is for ad hoc arrangements. Thus whenever a relevant issue arises a meeting is called. She also informed me, that the Pipeline Forum (SCMPF) also dissolved. She cited two main reasons: Firstly, the Department of Water Affairs withdrew funding for the secretariat and secondly, the Pipeline Forum had fulfilled its main purpose, the setting up of the two Permit Advisory Panels and so the Pipeline Forum no longer played such a vital role and there was no need for it to continue.

D.3.1.5 Observation

In October 1996 the necessary preconditions for a successful conflict resolution process over industrial effluent disposal on the South Coast of KwaZulu-Natal were given because the renewal of the Sappi Saiccor permit to discharge industrial effluent into the sea was pending. Thus, a balance of power among the involved parties existed.

The pending renewal of the government permission was, in my opinion, the main reason and motivation for all the stakeholders to work together to attempt to resolve the matter. In addition the conflict resolution process was very well structured and there was broad public involvement. The big effort in the separate stakeholder workshops to understand the other parties' interests and positions was an optimal preparation for a successful multi-stakeholder final workshop.

Furthermore all of the representatives received a full report on the outcome of all the stakeholders workshops and they had enough time to study these reports and to prepare themselves for the multi-stakeholder final workshop. After looking for common grounds among the stakeholders in the beginning of the multi-stakeholder process the parties

²⁶³ Email from 19 July 2005 to Dianne Scott (Programme Director: Geography and Environmental Management School of Environmental Science, University of Kwazulu-Natal).

agreed on the establishment of a Permit Advisory Panel. All stakeholders were represented in this panel and the remit of the PAP was to make recommendations in respect of the conditions for the pending permit to discharge industrial effluent into the sea and to guarantee a long term improvement in effluent quality.

The success of this conciliation process depended on different reasons. One of them was, in my opinion, the involvement of all the affected stakeholders at an early stage of the process. Another one can be seen in the establishment of common ground among the stakeholders during the process. The establishment of action plans and the PAP to ensure continual improvement of effluent and to guarantee long term improvement in effluent quality was also very important for the success of this process. And last but not least the pending renewal of the permission to discharge industrial effluent into the Sea was the trigger for the stakeholders commitment to work together and to find a solution.

This case shows that conciliation was a real alternative in South Africa to resolve environmental disputes even before the implementation of the statutory conciliation processes envisaged by Chapter four NEMA.

D.3.2 *The abalone farm case*

D.3.2.1 **Background to the dispute**

In a letter, dated 5 August 2000, EnviroAfrica an independent consultant informed the I & AP's (Interested and Affected Parties) that the Draft Scoping Report for the proposed abalone farm at Pringle Bay had been released for public comment and copies had been made available for viewing at different venues. Written comment on the Draft Scoping Report was required to be addressed to EnviroAfrica by 15 September 2000.²⁶⁵

On 3 August 2001 the *Mail & Guardian* reported that plans to develop an abalone farm in a biosphere reserve were meeting with opposition. According to the article, a decision by the National and Western Cape government to allow an abalone farm in the pristine Pringle Bay area, located in the buffer zone of the country's only United Nations-recognised biosphere, had triggered strong criticism from local residents

²⁶⁴ Email from 21 July 2005, written by Dianne Scott (Email in possession of the author).

and environmentalists.²⁶⁶ Both the local residents and the environmentalists argued that the proposed farm contravened the international agreement to declare the Kogelberg area a biosphere reserve and that it would set a precedent for the development of more abalone farms on the 65 other coastal plots between Pringle Bay and Betty's Bay.²⁶⁷ The Pringle Bay Ratepayers' Association also strongly opposed the project of an abalone farm, particularly because it would lead to an increase in heavy traffic in the beach resort.

The owners of the proposed abalone farm argued, on the other hand, that the group's concerns were unfounded because an Environmental Impact Assessment (EIA)²⁶⁸ had been submitted to and approved by the Western Cape Department of Environmental and Cultural Affairs and Sport. An application for a 15-year mariculture permit for the abalone farm had also been approved by the National Department of Environmental Affairs and Tourism.²⁶⁹

The proposed farm would consist of a pipe into the sea to extract seawater tanks and a shed to house a maximum of 25 tonnes of abalone, filtration and pumping apparatus, office space, settling tanks, a pump-house, seawater ponds, another pipe to return the water to the sea, an extension of an internal road and other infrastructure, covering approximately 3500m².²⁷⁰ A key provision of UNESCO's biosphere agreements is that each reserve should contain delineated and legally constituted core areas, clearly identified surrounding buffer zones and flexible transition zones, such as in residential areas. Biosphere reserves can only be maintained and survive if the integrity of these zones is preserved.²⁷¹ In the end, the Kogelberg Biosphere Association (KOBIO) conceded that a single abalone farm of limited size and situated within a

²⁶⁵ Invitation to comment on the Draft Scoping Report for the proposed Pringle Cove abalone farming, written by Charel Bruwer (Consultant EnviroAfrica) on 5 August 2000.

²⁶⁶ Streek 'Farming Project Draws Criticism' <http://www.fr.allafrica.com/stories/200108020337.html> (accessed on 14 April 2005).

²⁶⁷ Ibid.

²⁶⁸ EIA is a tool for decision-making that entails a process of identifying, analysing and evaluating the positive and negative environmental affects of a proposed development and its alternatives. The EIA regulations spell out procedures that must be followed before a decision-making authority such as the Western Cape Department of Environmental and Cultural Affairs can consider approving scheduled activities that may have a detrimental affect on the environment; see *You and Environmental Management in Western Cape* Cape Nature Conservation 12/1999 at 5.

²⁶⁹ Streek, op cit note 266.

²⁷⁰ Ibid.

²⁷¹ Ibid.

buffer zone property would probably not compromise the integrity of the adjacent core area. However, the organisation said that a number of similar ventures were being planned and that the approval of this application would undoubtedly be regarded as a precedent for the approval of the applications still in the pipeline.²⁷²

In the following paragraphs I examine how the parties tried to solve the dispute through facilitation/conciliation and why in the end a decision by the National and Western Cape Government was necessary.

D.3.2.2 The trigger of the process²⁷³

In a letter to the Minister of Environmental Affairs and Tourism, dated 15 August 2000, the Wildlife and Environment Society of South Africa (WESSA) requested appointment of a facilitator in terms of s 17(2) NEMA, to deal with a disagreement on the process followed in an application to establish an abalone farm on Pringle Cove a smallholding in Pringle Bay. The Wildlife and Environment Society was writing on behalf of a number of organisations, including Betty's Bay Ratepayers Association, Pringle Bay Women's Club, Friends of Hangklip, Pringle Bay Ratepayers, Hangklip Environmental Action Group and the Pringle Bay Residents Forum.

In their letter to the Minister, the disputing party listed the following key issues of concern:²⁷⁴

- 1. "That relevant and critical information concerning the application had not been supplied either prior to or at the one and only public meeting that was held on 1 July 2000. That the failure to supply such information had compromised both the capacity and opportunity of the interested and affected parties to make informed decisions and comment.*
- 2. That the public participation process had lacked fairness and transparency. That the sole public meeting had broken down irretrievably in the opening stages and that high levels of conflict had been displayed. That no attempt had been made to address the*

²⁷² Ibid.

²⁷³ The information with regard to the background on the facilitation/mediation process come from Andy Gubb which represented one of the public organisations (WESSA) in the dispute.

²⁷⁴ Letter of the public organisations to the Minister of environmental affairs and tourism (15 August 2001)

conflict through further discussion. That several I and AP's had requested that the matter be addressed prior to the release of the Draft Scoping Report, but that the request had been ignored.

3. *That the principal consultant had addressed the public meeting in an aggressive manner, and that his lack of independence in the matter had been evident. That the consultant had expressed a dislike of and even opposition to public participation. That the public participation consultants had failed to intervene to get the process back on track and that the public had been left with a clear perception that both the consultants had represented and had acted in favor of the developer."*

The disputing party requested a facilitation/mediation process in terms of Chapter 4 NEMA, to assist them to resolve the conflict, and reach consensus on a way forward in the matter.

D.3.2.3 The Process

The Minister of Environmental Affairs and Tourism upheld the request for facilitation and conciliation and appointed a facilitator in terms of s 17(2) NEMA, to conduct meetings of the I & AP's with the purpose of clarifying the issues of concern and identifying options for resolving these issues. The Minister informed that the process will be managed by officials of the Department of Environmental Affairs and Tourism (DEAT) and the officials of the provincial Department of Environmental and Cultural Affairs and Sport (DECAS). Furthermore he informed that all I & AP's will be contacted shortly with details of the date, time and venue of the meeting.²⁷⁵

D.3.2.3.1 Facilitation Process

The first meeting took place in Pringle Bay on 24 February 2001. Four groups were mainly involved in the process. The four groups were the developers²⁷⁶, the public organisations²⁷⁷, the representative of KOBIO²⁷⁸ and the Government. Bill Thomson was appointed as facilitator. The facilitator explained at the beginning the process that the facilitation

²⁷⁵ Letter of the Minister of environmental affairs and tourism (15 December 2000).

²⁷⁶ The group of the developers consisted of the applicants and the consultants.

²⁷⁷ The group of the public organisations consisted of eight civil and environmental organisations.

²⁷⁸ Koegelberg Biosphere.

would follow. He referred to the agenda stating that the purpose of the meeting was to list/clarify/structure the issues of concern/in dispute, and to explore/agree options for the resolution of the issues of concern/in dispute.²⁷⁹

In a first step the groups were asked to establish some ground rules for the meeting (i.e. keep discussion to current points, one person to speak at a time, discussion/debate to be around process and not content etc.).²⁸⁰

The role of government observers was then briefly discussed. One of the representatives²⁸¹ of the Government said that the facilitation was a first time process for Government and that they had hoped to learn from it. She said that Government would gladly and willingly give information to the group and that Government was not there in a participant capacity but had a responsibility to ensure that the facilitation process took place in terms of NEMA.²⁸² The representative of the Government then took the parties through NEMA, and told them what the Department of Environmental Affairs and Tourism was doing to give effect to Chapter 4 of NEMA.

She then responded to the specific questions raised in the letter, dated 21 February 2001, from WESSA and the other public organisations to the facilitator concerning the process. Most of the questions dealt with the facilitation and mediation process in a general way.²⁸³

Then the discussion shifted to the consultants of EnviroAfrica which drafted the scoping report for the proposed abalone farm on Pringle Cove smallholding, Pringle Bay. The representative for the public organisations raised the question to the independence of the consultants. He said that clarification was needed on the scoping report and that their understanding was that the consultant should not give an opinion. The facilitator then requested the public organisations to list the issues that they believed were in dispute. The public organisations raised their list of disputed items. The representative of the Government then said that,

²⁷⁹ Record of facilitation meeting held on 24 February 2001 at the Pringle Bay Church Hall at 1.

²⁸⁰ *Ibid.*, at 2.

²⁸¹ There were different representatives of the Government (i.e. DEAT: Law Reform, Planning and Conciliation and DEAT: Marine & Coastal Management).

²⁸² *Ibid.*, at 2.

²⁸³ *Ibid.*, at 4-8.

based on the list of disputes raised by the public organisations, she saw four key issues being raised by the public organisations.

The meeting then drifted into dispute resolution mode, as participants attempted to deal with the issues that were being raised, and to debate them. The facilitator therefore re-clarified that the purpose of the facilitation meeting was to list the issues in dispute, and for the participants to seek clarity as to the parties' understanding of the issues raised and not debate the merits of the issues or the parties' positions.²⁸⁴ After some discussion it was agreed to adjourn so that the public organisations could put together a list of the issues in dispute. It was agreed that once this had been done the public organisations would forward to the facilitator more detailed information in support of the points raised on the list and that such additional information then be forwarded to the developer party for their response. In the end the following nine key points in dispute were identified by the public organisations:²⁸⁵

1. *"Identification of I & AP's: (Disputing how this was handled)*
2. *Background information document and scoping report: (Disputing the way the process of consultation was handled, and the time frames that were given for the submissions. Also disputing that the content of submissions were not considered or reflected.*
3. *Public meeting: (Disputing the way the public meeting was handled).*
4. *Draft and final scoping reports: (Disputing the way it was put together. Disputing that report was not complete).*
5. *Lack of information/supply of adequate information: (Disputing that there had been a lack of information throughout the process, and that areas of information had been needed in order to be able to comment adequately on the scoping report).*
6. *Bias/lack of independence and lack of objectivity by the consultant resulting in prejudice towards the interested and affected parties: (Disputing this point with regard to the whole process, including the scoping record).*

²⁸⁴ Ibid., at 12.

²⁸⁵ Ibid.

7. *Lack of appropriate alternatives offered.*
8. *Setting of precedent: (Concern by public that the granting of such application would lead to the setting of a precedent for further such development. Disputing the fact that this point was not adequately addressed in/by the process).*
9. *Interpretation and application of EIA process by consultant."*

The parties then agreed to meet for another facilitation meeting and nominated different participants to undertake all necessary steps for the second facilitation meeting (i.e. the facilitator was obliged to distribute the agreed next steps and points in dispute in paper form no later than 26 February 2001)²⁸⁶.

The second facilitation meeting took place on 17 March 2001. The facilitator explained that the meeting would be a continuation of the meeting held on 24 February 2001, and that the purpose of the meeting was to list the issues in dispute, and then to decide whether the dispute should be referred to conciliation.²⁸⁷ The discussion then shifted to the question whether there had been other applications for the establishment of an abalone farm. The representative of the Government said that there had been a number of abalone farming applications for other areas.

The facilitator then asked the public organisations if they had a list of the issues in dispute. In a caucus the facilitator met with the public organisations to discuss the list of the issues in dispute. When the meeting re-convened, the facilitator said that the public organisations had listed the points in dispute as being the nine points made at the last meeting that were e-mailed to all the participants following the meeting.²⁸⁸ The developers then suggested that the public organisations go through the points that the developers had listed under the public organisations nine points, in response to the information sent to them by the disputing party, and decide whether the developer's attempted understanding of the issues could be put under the nine headings. The facilitator then met with the public organisations and the developers separately. When the meeting re-convened the following was agreed:²⁸⁹

²⁸⁶ *Ibid.*, at 13.

²⁸⁷ Record of facilitation meeting held on 17 March 2001 at the Pringle Bay Church Hall at 2.

²⁸⁸ *Ibid.*, at 3.

²⁸⁹ *Ibid.*, at 4.

- *"that the issues in dispute would be the nine points listed in the previous meeting;*
- *that the disputing party would put together a single list of the issues in dispute, and that such a list would be given to the developers on 23 March 2001 prior to the conciliation meeting;*
- *that the dispute would be referred to mediation;*
- *that the mediation meeting would start on 23 March 2001."*

The discussion then shifted to the mediation process and one representative of the public organisations asked what would happen if the conciliation process did not resolve all the issues in dispute. The representative of the Government referred to the options listed by the Minister in his letter from 15 December 2000, namely that either the competent authority would make a final decision using the additional information that had emerged during the conciliation process; or that the parties themselves would have to finance any further conciliation process; or that the parties could agree to refer the matter to arbitration in terms of section 18(6) NEMA, at their own cost.²⁹⁰

Following discussion as to whether government representatives should be present at the conciliation, it was agreed that it would be important for them to be there as observers of the process as they were in the best position to interpret NEMA and to give expert input.²⁹¹

It was agreed that the conciliation meeting would start at 14h00 on 23 March 2001 and continue until 21h00. The meeting would re-convene at 09h00 on 24 March 2001 and continue until 18h00, with the option of the parties agreeing to extend to conciliation for up to another two hours. Finally, it was stated that what was not agreed at the end of the conciliation meeting, would be taken as not agreed, and that the parties would then need to decide how to take the process further from that point.²⁹²

²⁹⁰ Ibid., at 5.

²⁹¹ Ibid., at 6.

²⁹² Ibid., at 7.

D.3.2.3.2 Mediation/Conciliation Process

On 23 March 2001 the parties met for the first conciliation meeting under Chapter 4 NEMA. The conciliator explained the conciliation process, and the role of joint and side meetings. In addition to adopting the ground-rules agreed to at the facilitation meeting on 24 February, a further agreed ground rule was added: anything said to the conciliator in a side caucus would be treated as confidential. Should the party in such a side caucus wish the conciliator to convey information from the side caucus to the other party, they would inform the conciliator accordingly.²⁹³

The conciliator then invited the parties to make opening statements. The purpose of this stage of the process was to give each party an opportunity to relate their story without interruption.

The representative of WESSA said that the public participation process had gone off the rails. He said that if the EIA process had been run fairly and effectively that WESSA would have accepted the outcome of the process. He continued that the communities in the area needed to feel that their needs and concerns had been taken into account. He said that it was possible to get the process back on track and to get a good document, but that some aspects of the EIA process might have to be repeated.²⁹⁴

The representative of the Hangklip Environmental Action Group expressed concerns that the I & AP's had been disadvantaged in that the basic requirements of objectivity and independence had not been met. The scoping process had been owned by the consultants and that therefore the process had been short cut and had been biased. They were not against the abalone farm as such, but that they did not want the decision to be made without a proper consideration being given to environmental issues.²⁹⁵

The representative of the Pringle Bay Ratepayers Association (PBRA) said that they were looking at a river/tide of similar such applications/developments and that the impact to the area could be disastrous.²⁹⁶

²⁹³ Record of conciliation meeting held on 23 & 24 March 2001 at the Somchem Hall at 2.

²⁹⁴ *Ibid.*, at 3.

²⁹⁵ *Ibid.*, at 4.

²⁹⁶ *Ibid.*, at 4.

The representative of the friends of Hangklip said that the process has flawed. She said that the consultants had been biased and that the Kogelberg Biosphere would be threatened by the development. She said that a better EIA needed to be done.²⁹⁷

The representative of KOBIO said that KOBIO objected to the scoping phase of the EIA and that they wanted it re-done. KOBIO wanted an objective document that would help Government to make an objective decision. He continued that they wanted UNESCO to be acknowledged in the report, because they were dealing with a biosphere and not just a small town affair. He said that the application for abalone farming might instigate further development along the coast and that this could have international implications.²⁹⁸

Finally the representative of the Pringles Bay Women's Club stated that they raised concerns specifically to do with dust, noise, employment, shacks, dwellings and the increase in traffic.²⁹⁹

The discussion then shifted to the nine broad categories which had been identified by the public organisations in the facilitation process as being the key issues in dispute. The public organisations had combined and grouped their concerns into one cohesive document. This resulted in a 24 page document, listing over a hundred different concerns. The document was presented to the applicants for response during the conciliation meeting. The developers were reluctant to respond to the individual issues as listed and wanted to group the issues into three broad categories. These categories were:³⁰⁰

- Process, including community involvement in decision-making and the alleged bias in the Scoping Report;
- Environmental issues, including the setting of precedent and the Biosphere Reserve;
- Neighborhood issues, which included noise, dust, disturbance and visual impact.

The discussion then shifted to the question why the developers did not want to respond to the nine points refined by the public organisations.

²⁹⁷ Ibid., at 4.

²⁹⁸ Ibid., at 4.

²⁹⁹ Ibid., at 5.

³⁰⁰ Ibid., at 6.

The developers argued that they had gone through the balance of the items on the list and that they did not believe it to be a list at all but rather a cut and paste exercise as opposed to the original list. They said that a mountain of stuff had been written about a few disputed points and they therefore proposed to work from the three categories mentioned above.³⁰¹ At this point the meeting broke into side meetings and, the conciliator met with the two parties separately.

The conciliator summarised the proceedings that had taken place during the side meetings as follows:³⁰²

- *"The public organisations were of the opinion that the proposed approach of the developers would not do justice to the many and complex concerns that had been put on the table. They felt that the scoping report should be redone. They proposed that a series of meetings/workshops be held with members of the public organisations for this purpose.*
- *The developers were not prepared to redo the scoping report and they did not want to hold any further information workshops. They had proposed in turn that one or two people from the public organisations spend 1 to 2 hours going through the scoping document at the conciliation meeting with one representative of the developers and indicate where information should either be deleted or added.*
- *The public organisations were not in agreement with the above 1 to 2 hour proposed meeting with one representative of the developers. They said that of the nine points in dispute that they could cut them down to the point dealing with lack of information/supply of adequate information.*
- *The next proposal made by the environmental and civic groups was that a series of workshops be held around the single category of inadequate supply of information. The developers' response to this was the suggestion that the consultant and the representative of WESSA should go through the scoping report that afternoon, indicating with a highlighter where information should be deleted. Additional information for inclusion must have been previously referenced i.e. no new*

³⁰¹ Ibid., at 10.

³⁰² Ibid., at 13.

information was acceptable. The process had to be accomplished by the end of that afternoon. The developers also demanded that the public organisations would agree to relinquish their right to appeal against any decision made by DECAS.

- *The public organisations rejected this suggestion. They felt that the developers were responding to the public organisations' genuine attempts to seek a way forward by putting less and less accommodating and unrealistic proposals on the table."*

At this point the representative of the public organisations asked whether the parties could go to arbitration, if the parties reached deadlock. The representative of the Government said that the parties under s 19 NEMA could go to arbitration, but that it would be for their own cost and that the arbitrator's decision would be final.³⁰³ She also said that there would still be the right to appeal if the competent authority made a final decision³⁰⁴

As the discussion progressed, it appeared as if the parties were unable to reach agreement. The process was in danger of being deadlocked. The conciliator therefore asked for an adjournment to the meeting so that the disputing party could caucus to consider the various options that had been discussed. Thanks to the caucus the deadlock could be avoided and both parties agreed on the following:³⁰⁵

- *"The flawed final scoping report would be assessed by DECAS for a decision on the application*
- *All new information that had been submitted by the disputing parties during the facilitation and the conciliation process would be submitted for equal assessment with the final scoping report.*
- *DECAS will hold a hearing where the two parties will be allowed to give presentations and where environmental and civic groups may present expert opinion, gathered at their expense. This expert opinion will cover four areas: The suitability of the area for mariculture; whether the impacts of a mariculture industry were acceptable within the buffer zone of a Biosphere Reserve; the issue of precedent-setting and*

³⁰³ Ibid., at 17.

³⁰⁴ Ibid, at 18.

³⁰⁵ Press Release *Outcome of conciliation process 23-24 March 2001*

whether this is a valid counter argument in the application; and the community's constitutional rights in participating in such a decision-making process."

The authorities agreed to set up a hearing within two weeks of receiving the above information, so that the parties would be able to give written submission, verbal evidence and make representations. After the hearing, the authorities said that they would make a decision on the application having taken the above information into consideration. The hearing was held on 7 May 2001.

On 24 July 2001 the DECAS made a decision on the application for the establishment of an abalone farm on Pringle Cove. The DECAS granted the developers the authority to establish an abalone farm on Pringle Cove small-holding, Pringle Bay. The appeal of the public organisations in terms of s 35 of the Environment Conservation Act, 1989, against the decision of the DECAS was dismissed by the Minister of Environmental Affairs and Tourism on 14 November 2001.³⁰⁶

D.3.2.4 Observation

The conciliation process did not resolve the dispute about the establishment of an abalone farm on Pringle Cove smallholding, Pringle Bay. The attempt to resolve the dispute by mediation had already - in my opinion - reached deadlock by the time the parties agreed that the DECAS would set up a hearing so that the parties could give written submissions, verbal evidence and make representation on each of the issues in dispute. At this point the parties gave up the power to reach a binding agreement through conciliation since it was apparent after the meeting that in the absence of an agreement the statutory authorities and in particular the Ministry would make a unilateral decision on the application.

Nevertheless, the search for the reasons of the breakdown of the conciliation and the reasons seeking a litigated solution remains. In my opinion the conciliator, who was the neutral third party involved in the facilitation and conciliation process would be in the best position to know objectively why the conciliation process failed. I approached the

³⁰⁶ In the end the establishment of the abalone farm on Pringle Cove smallholding, Pringle Bay failed because the rezoning of the proposed land for into agriculture zone (zone 1) was rejected by the Government.

facilitator/conciliator and asked his opinion for the failure of the conciliation process. In his email³⁰⁷ the conciliator advanced several reasons. He suggested that the party that had “lost” at the hearing, may have decided that litigation would be an appropriate next step to realise their needs. He also questioned the readiness of the parties to genuinely seek a creative solution to the conflict from the beginning of the process. The impression of the conciliator was that the parties might have been too far apart to find an agreed solution. It could too have been that the parties had held on to their positions too tightly, and through these positions, that might have been underpinned with interests that they were not prepared to trade. The decision to have the Minister of Environmental Affairs and Tourism make the decision for them was the final route followed to try to resolve the dispute.

There is much to support the reasoning of the conciliator. It seems that the conciliation process was introduced too late, at the date where a draft scoping report already existed and where the developers had few motivation to cooperate with the public organisations and to redo the scoping report. Furthermore, it looks like that the government acted in collusion with the proposed establishment of an abalone farm because they probably feared that the rejection of the proposed abalone farm would slow down economic development and prevent the creation of new jobs in the area. It seems also that the developers had already grown impatient with the dispute before conciliation was attempted. They probably thought that with a bit of spin and public participation the criticisms could be dissipated. The environmental and public organisations were not seen as anything but people with quarrels and concerns rather than adult participants in a joint exercise to find common ground. In my opinion the developers lacked the acceptance and recognition for the other parties issues or interests but without a perception of legitimacy, negotiations may never begin.³⁰⁸

However, I think the facilitation/conciliation process as such had also its positive effects and was most of the time handled well by the facilitator/conciliator. The process had clear structures and the

³⁰⁷ Email, dated 27 July 2005, written by the conciliator (Email in possession of the author)

³⁰⁸ See also Moore, *op cit* note 47, at 188.

facilitator/conciliator enjoyed the trust of all the parties. The facilitator/conciliator also took several chances to use caucuses to avoid deadlock in the facilitation/conciliation procedure. The parties and the mediator even established ground rules in the beginning of the procedure which was an important step to create respect and common values among the parties. But unfortunately the facilitator/conciliator missed the opportunity to create common ground among the parties at a later date of the procedure.

Finally one can say that even though the conciliation process did not succeed it was a milestone in terms of the decision-making process of chapter 4 NEMA. It is therefore an even bigger surprise that since then no other conciliation processes in terms of NEMA have taken place.

D.3.3 Comparison of the two procedures

One reason for the different outcomes of the procedures can be seen in the initial positions of the two cases. The background of the initial position of the conflict at the upper South Coast of KwaZulu-Natal has been a great controversy over decades. In this case the presence of foam, discolouration and toxicity have caused concerns and led to heightened tensions within the local community and the sea users. This and the pending renewal of one company's permit to discharge industrial effluent into the sea convinced the three companies to agree on the establishment of the South Coast Marine Pipeline Forum in August 1995. In the other case the controversy was mainly about the 'possible' impact of the proposed abalone farm on the biosphere reserve. While in the first conflict the impact of the disposal on the environment was obviously the impact in the second case on the environment could not be predicted yet. Thus, the initial positions of the two processes were totally different.

The owners of the proposed abalone farm missed the opportunity to involve the environmentalists and residents at a early date of the process and to exempt them from their fear that the proposed abalone farm would have an impact on the biosphere reserve and that this case would set a precedent for the development of more abalone farms on the other coastal plots. By not involving the I & AP's in the process at a early date of the procedure the owners of the proposed abalone farm gave the

environmental and civil groups the feeling that they were not seen as anything but people with quarrels and concerns rather than adult participants in a joint exercise to find common ground. The statement of the owners of the proposed abalone farm that the group's concerns were unfounded because an EIA had been submitted to and approved by the DECAS shows that the legitimacy of the NGOs has not been accepted at all. The draft of the scoping report without the information respectively participation of the NGOs turned out to be an insurmountable burden during the whole procedure. In contrast to this the I & AP's in the conflict on effluent disposal were already involved at an early date of the procedure.

Another advantage of the procedure at the South Coast of Kwazulu-Natal was the subdivision of the process in stakeholder workshops and in a multi-stakeholder final workshop. The aim of the stakeholder workshops was mainly to ensure the understanding for the other groups' perspectives and to remind the group that the situation involved competing interests that required balancing. The process on abalone farming lacked such a reminder of competing interests that required balancing. And even though the aim of the facilitation process was to clarify the issues in concern and to identify options for resolving these issues the groups already drifted during this phase of the procedure into dispute resolution mode, as they attempted to debate the issues that were being raised.

Another very important step during the procedure at the South Coast of Kwazulu-Natal was the creation of common ground among the stakeholders at the beginning of the multi-stakeholder final workshop. In an attempt to test the stakeholders commitment to the process they were asked to select one of three possible scenarios. All stakeholders selected the same scenario, they agreed that regulation of pollution was the appropriate way to go. There was no such attempt to create common ground among the stakeholders during the procedure on the proposed abalone farm. In my opinion the facilitator/conciliator missed the opportunity to test the parties commitment to the ongoing procedure. He missed the opportunity to find out if the developers agreed only on abalone farming without restriction, if the NGOs rejected the establishment of the abalone farm in the Koegelberg area in general or if

both parties agreed on abalone farming under certain conditions. By testing the stakeholders he would have had the opportunity to determine the commitment of the parties to the procedure at an early date of the process and, at best, to create common ground among the parties.

Finally, the involvement of the authorities in the processes was different. In the first case (the one at the South Coast of Kwazulu-Natal) the Minister of Water Affairs was only involved on the brink of the procedure. In the second case the government played a more important role since it was the first dispute under Chapter 4 NEMA. Thus the government was involved in a function as observer and adviser. This was in my opinion problematic because the owners of the proposed abalone farm argued at some point that the NGOs concerns were unfounded because the EIA had been submitted to and approved by the Western Cape Department of Environmental and Cultural Affairs and Sport. They also argued that an application for a mariculture permit for the abalone farm had also been approved by the National Department of Environmental Affairs and Tourism. With regard to this it was difficult for the government to meet the criteria as an independent observer and adviser and the question arises if the participation of the government in this procedure was nothing more than a bad faith exercise.

In the end one can say that the initial point of the process at the South Coast of Kwazulu-Natal was more promising for a successful mediation than the one at the Pringle Bay process. The visible pollution, the pending renewal of one company's permit to discharge industrial effluent disposal and the preservation of hundreds of jobs in the area cannot be underestimated with regard to the commitment of the parties to find a solution. Nevertheless, even if the initial point for a successful mediation process was more difficult the parties missed a great opportunity to find a solution in the case on the proposed abalone farm. They not only missed to profit from the experience of the procedure at the South Coast of Kwazulu-Natal but they also lacked from the beginning an acceptance and recognition for the other parties issues but without a perception of legitimacy, negotiations may never begin.

E ***Remarks and Conclusion***

E.1 **Remarks**

I want to highlight some of the special features, which distinguish environmental mediation in South Africa and Switzerland. A major distinction between South Africa and Switzerland with regard to environmental mediation lies in the acceptance of this form of environmental dispute resolution by the respective legislatures. While South Africa recently enacted Chapter 4 NEMA containing a number of provisions aimed at providing a mechanism for resolving potential environmental conflicts through mediation, Switzerland lacks any legislation with regard to mediation as a mechanism to resolve environmental disputes. In the Swiss legal system environmental mediation remains statutorily neither encouraged nor forbidden. The reason for this lack of legislation can surely be seen in the Swiss political culture, where consent is important, negotiated solutions and other consensus-building mechanisms are widespread. (Environmental) conflicts in Switzerland are normally solved through negotiations, ballots, legal proceedings, cooperation or professionalisation and last but not least through the avoidance of conflicts on controversial matters.³⁰⁹ With regard to the existing types of resolution mechanisms one can say that the Swiss legislature has little impetus to enact a law similar to the one that exists in South Africa.

Another distinction lies in the available mediation infrastructure in South Africa and Switzerland. Switzerland, in contrast to South Africa, as a result of the aforementioned other types of resolution mechanisms, lacks sufficient mediation infrastructure. As a consequence the country also lacks skilled and trained (environmental) mediators. The absence of a mediation infrastructure and the lack of skilled mediators in Switzerland would make it even more difficult to establish mediation among the already existing types of resolution mechanisms. South Africa, on the other hand, possesses an extensive mediation infrastructure thanks to the establishment of the Independent Mediation Service of South Africa

³⁰⁹ Knoepfel, op cit note 53, at 277.

(IMSSA) in 1984.³¹⁰ IMSSA trained mediators and arbitrators in employment relations and made their services available to employers and employees.³¹¹ As a result of the establishment of IMSSA more than 20 years ago, South Africa possesses many skilled, trained and experienced mediators. This is a big advantage for the promotion of mediation to resolve environmental disputes.

Even though Switzerland lacks any legal provisions with regard to mediation as an environmental dispute resolution and a sufficient mediation structure I have shown, on the basis of several cases, that in Switzerland mediation-type activities are nowadays frequently used to resolve environmental disputes and that the Swiss decision-making system, especially in areas of environmental politics where there is yet little participation, would offer a good opportunity for environmental mediation procedures. A recent survey of the Swiss experience in environmental mediation has showed that the experiences made so far with environmental mediation have been assessed as being positive to very positive with the reservation "if performed professionally".³¹² To perform environmental mediation professionally it may be necessary to establish a legal basis and to establish a mediation infrastructure. Only the future will show if the Swiss political culture is willing to implement environmental mediation in its conflict resolution system or if it will stick to the existing resolution mechanisms to resolve environmental disputes.

E.2 Conclusion

Even though there is as yet no established tradition of environmental mediation, South Africa has established the necessary foundations for the establishment of mediation as a mechanism to resolve environmental disputes. Thanks to the IMSSA experience South Africa has a wide range of skilled, adequately trained and experienced mediators as well as the National Environmental Act 107 of 1998 and its Chapter 4 as a legal basis for mediation to resolve environmental disputes. Because of the existing mediator expertise the risk of mediation being discredited is small.

³¹⁰ Nina, op cit note 195.

³¹¹ Steadman, op cit note 194.

Despite the statutory support and the presence of experienced mediators environmental mediation as a tool of conflict resolution is not seen as a preferred mechanism in South Africa. One reason for this may be the fact that the Department of Environmental Affairs and Tourism (DEAT) has yet not processed a successful case using alternative dispute mechanisms as mentioned in Chapter 4 NEMA and that the DEAT is almost seven years after the Act was enacted, still working on an implementation plan for this chapter. There is no clear indication that the Department charged with the responsibility of establishing a mediation service is committed to it. It is possible that this Department respectively the government of South Africa is concerned that chapter 4 NEMA processes would slow down economic development in a country which is already affected by a high rate of unemployment. Another reason why it takes the Government so long to implement chapter 4 could be that the government sees the stakeholder approach which is at the heart of environmental mediation as 'naive green optimism'. Only the future will show if such an implementation plan will ever help to establish environmental mediation in South Africa as the legislator intended.

Switzerland, on the other hand, is still struggling to accept mediation as an appropriate let alone a necessary mechanism to resolve environmental disputes, as its entire political and administrative culture and institutions are suffused with numerous negotiation elements and mediation-type activities. Therefore, for the present and the immediate future, the value of environmental mediation processes is likely to remain negligible because, despite extensive potential for conflict the national and cantonal authorities provide for forms of negotiation on a more or less defined scale. In most instances there is no need for a mediator as there are already neutral, negotiation persons who help in the resolution of environmental conflicts.³¹³ In many cases a mediation institution would probably face rejection, as it would be interpreted as an confession by the traditional and new institutions, and also the parties involved in conflict, that they are professionally not competent to resolve their disputes.³¹⁴

³¹² Environmental Mediation in Europe, op cit note 52, at 58.

³¹³ Weidner, op cit note 65, at 232.

³¹⁴ Knoepfel, op cit note 53, at 277.

Nevertheless, this Swiss attitudes towards traditional mechanisms to resolve environmental disputes will probably also prevent the establishment of environmental mediation in areas where environmental mediation could provide considerable enrichment to the existing mechanism for conflict resolution. This is especially in areas of environmental politics where there is little public participation, for example the non-governmental implementation of political decisions. In this area the Swiss decision-making systems offers a good basis for mediation procedures.³¹⁵

³¹⁵ Waelti, op cit note 51, at 296 et sqq..

F ***Bibliography***

Journal Articles

Bray E 'Co-operative governance in the context of the National Environmental Management Act 108 of 1998' (1999) 6 *South African Journal of Environmental Law and Policy* 1

Brunner S 'Energiefrieden: Grundmauern erschüttert' (1993) 1 *Energie + Umwelt* 4

Fisher D E 'Land sourced pollution of the marine environment' (1995) 12 *Environmental & Planning Law Journal* 116

Fiss O M 'Against Settlement' (1984) 93 *The Yale Law Journal* 1073

Kidd M 'The National Environmental Management Act and public participation' (1999) 6 *South African Journal of Environmental Law and Policy* 24

Kubasek N & Silverman G 'Environmental Mediation' (1988) 26 *American Business Law Journal* 540

Neff M 'Einsatzmöglichkeiten von alternativen Verfahrensmethoden und Konfliktmittlung bei der Realisierung von Grossprojekten' (2001) *URP* 368

Phillips B A & Piazza A C 'The Role of Mediation in Public Interest Disputes' (1983) *Hastings Law Journal* 1234

Rycroft A, Scott D & Robertson B 'Environmental Mediation: A case study on conflict over marine resources' (1998) 5 *South African Journal of Environmental Law and Policy* 88

Schoenbrod D 'Limits and Dangers of Environmental Mediation' (1983) *58 New York University Law Review* 1453

Tompkins R E 'Mediation, the Mediator, and the Environment' (1996) *1 Nat. Resources and Environment* 68

Van den Berg J P 'Environment dispute resolution in South Africa-towards sustainable development' (1998) *5 South African Journal of Environmental Law and Policy* 81

Waelti S 'Neue Problemlösungsstrategien in der nuklearen Entsorgung' (1993) *33 Schweizerisches Jahrbuch für Politische Wissenschaften* 211

Weidner H 'Der verhandelnde Staat. Minderung von Vollzugskonflikten durch Mediationsverfahren?' (1993) *33 Schweizerisches Jahrbuch für politische Wissenschaften* 240

Williams, B A 'Consensual approaches to resolving public policy disputes' (2000) *Journal Dispute Resolution* 144

Books

Boulle L & Rycroft A *Mediation: Principle, Process and Practice* (1997) Butterworths (South Africa)

Fisher R & Ury W *Getting to Yes: Negotiating Agreement Without Giving In* (1991) Random House (USA)

Glazewski J *Environmental Law in South Africa* (2005) LexisNexis Butterworths (South Africa)

Knoepfel P *Lösung von Umweltkonflikten durch Verhandlung Beispiele aus dem In- und Ausland* (1995) Helbling & Lichthahn (Switzerland)

Knoepfel P, Eberle A, Gerhauser F W & Girard N *Energie und Umwelt im politischen Alltag* (1995) Eidg. Drucksachen- und Materialzentrale (Switzerland)

Knoepfel P & Zuppinger U *Usine d'incinération de déchets spéciaux (UIDS), Ciba-Geigy à Bâle* (1996) Etude de cas de l'IDHEAP (Switzerland)

Lake L M (editor) *Environmental Mediation: The Search for Consensus* (1980) Westview Press (USA)

Linder W *La décision politique en Suisse. Genèse et mise en oeuvre de la législation* (1987) (Switzerland)

Lovenheim P *Mediate, Don't Litigate* (1989) McGraw-Hill Publishing Company (USA)

Moore C W *The mediation process practical strategies for resolving conflicts* (2003) Jossey-Bass (USA)

O'Leary R & Bingham L B *The Promise and Performance of Environmental Conflict Resolution* (2003) RFF Press (USA)

Riskin L & Westbrook J E *Dispute Resolution and Lawyers* (1998) West Group (USA)

Susskind L & Cruikshank J *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (1987) Basic Books (USA)

Wälti S *Problemlösungsstrategien in der nuklearen Entsorgung* (1994) University Press of Geneva (Switzerland)

Weidner H (editor) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) sigma (Germany)

Zimmerman W & Knoepfel P *Umwelt und Landwirtschaft im politischen Alltag. Drei Fälle für die Schule* (1987) Eidg. Drucksachen- und Materialzentrale (Bern)

Yarn D *Alternative Dispute Resolution: Practice and Procedure in Georgia* (1997) Harrision Company (USA)

Websites

Burundi Report February 2000

http://www.ccrweb.ccr.uct.ac.za/archive/burundi_reports/burrep-feb2000.html (accessed 30 July 2005)

CH Politik 1990-2001

<http://www.anneepolitique.ch/docu/CHPolitik1990-2001.pdf> (accessed 14 August 200)

Department of Environmental Affairs and Tourism website

<http://www.environment.gov.za/soer/nsoer/resource/nema/a%20user%20guide%20to%20nema.html> (accessed 15 May 2005)

Nina D *Beyond mediation: How South Africa's Other Mediation is Challenging Conventional Models*

<http://www.trinstitute.org/ojpcr/tracktwo4.htm> (accessed 11 July 2005)

Odendaal A *Modelling Mediation: Evolving approaches to mediation in South Africa*

http://www.trinstitute.org/ojpcr/1_3tt2.htm (accessed 11 July 2005)

Parlamentarische Initiative Kehrrechtsverbrennungsanlage (KVA) des Kantons Tessin

<http://www.admin.ch/ch/d/ff/2003/8025.pdf> (accessed 14 August 2005)

Saldanha Bay Conflict

<http://www.ccrweb.ccr.uct.ac.za/archive/two/4/p7.html> (accessed 15 July 2005)

Steadman F *The experience of workplace mediation in South Africa-lessons for the UK?*

http://www.cedr.co.uk/index.php?location=/library/articles/workplace_mediation_in_SA.htm (accessed 11 July 2005)

Streek B *Farming Project Draws Criticism, in: Mail & Guardian (3 August 2001)*

<http://www.fr.allafrican.com/stories/20010802337.html> (accessed 14 April 2005)

Other documents

Barbour T *National Environmental Management Act No. 107 of 1998 A brief Introduction* (1999) Development Facilitation Training for IMSSA Mediators

Cape Nature Conservation 12/1999 *You and Environmental Management in Western Cape*

ISTM-Institute for Systems & Technology Management *Environmental Mediation in Europe-Status and Experiences; Procedures for Resolving Environmental and Water Management* (2000) Federal Ministry of Agriculture and Forestry, Environment and Water Management, Department of EU Affairs (Austria)

Letter EnviroAfrica *Invitation to comment on the Draft Scoping Report for the proposed Pringle Cove Abalone grow-out facility (5 August 2000)* (the letter is accessible in the office of WESSA, Cape Town)

Letter of the Minister of Environmental Affairs and Tourism (15 December 2000) (the letter is accessible in the office of WESSA, Cape Town)

Letter of the public organisation to the Minister of environmental affairs and tourism (15 August 2000) (the letter is accessible in the office of WESSA, Cape Town)

Press Release *Outcome of conciliation process, 23-24 March 2001* (the press release is accessible in the office of WESSA, Cape Town)

Record of Conciliation Process Meeting held on 23 & 24 March 2001 at the Somchem Hall (the record is accessible in the office of WESSA, Cape Town)

Record of Facilitation Process Meeting held on 24 February 2001 at the Pringle Bay Church Hall (the record is accessible in the office of WESSA, Cape Town)

Record of Facilitation Process Meeting held on 17 March 2001 at the Pringle Bay Church Hall (the record is accessible in the office of WESSA, Cape Town)

Report on the Conciliation Process *Establishment of an abalone grow-out facility on Pringle Cove smallholding, Pringle Bay* (April 2001) (received by Email from Judy Beaumont)

Standards of conduct for mediators *Mediation: Sarah
Christie Conciliation Module-Outline short loan reading list (Handout 10)*
12 August 2004 (paper in possession of the author)